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Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD S. BAUMHAMMERS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the trial court's failure to permit the defense to introduce evidence of Petitioner's parole ineligibility, the likelihood of commutation and to instruct the jury that Pennsylvania law does not permit a defendant convicted of first-degree murder to be released on parole violated Petitioner's due process and Eighth Amendment rights. *Simmons v. South Carolina*, 512 U.S. 154 (1994).

2. Whether the "victim impact" evidence presented at the penalty phase was unduly prejudicial and violated the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Payne v. Tennessee*, 501 U.S. 808 (1991).

3. Whether the Eighth Amendment prohibits the imposition of the death penalty on a mentally ill person. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, Richard S. Baumhammers, and Respondent, the Commonwealth of Pennsylvania.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Procedural History	2
MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW	5
REASONS FOR GRANTING THE PETITION	6
I. SINCE THE EVIDENCE RAISED AN INFERENCE OF BAUMHAMMERS' FUTURE DANGEROUSNESS, *SIMMONS V. SOUTH CAROLINA* ENTITLED HIM TO A JURY INSTRUCTION THAT HE WOULD BE INELIGIBLE FOR PAROLE IF SENTENCED TO LIFE IMPRISONMENT	6
A. The Due Process Violation	6
B. The Eighth Amendment Violation	17

TABLE OF CONTENTS – Continued

Page

II. THE "VICTIM IMPACT" EVIDENCE PRESENTED AT THE PENALTY PHASE WAS UNDULY PREJUDICIAL VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 20

III. THE EIGHTH AMENDMENT PROHIBITS THE IMPOSITION OF THE DEATH PENALTY ON A MENTALLY ILL PERSON 27

CONCLUSION 34

APPENDIX A, Opinion from the Supreme Court of Pennsylvania, filed November 20, 2008 ..... App. 1

APPENDIX B, Opinion from the Allegheny County Court of Common Pleas, filed December 29, 2005 ..... App. 135

APPENDIX C, Denial of Petition for Rehearing, filed February 24, 2009 ..... App. 136

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Atkins v. Virginia, 536 U.S. 304 (2002) .....*passim*

Coker v. Georgia, 433 U.S. 584 (1977) 34

Enmund v. Florida, 458 U.S. 782 (1982).....34

Ford v. Wainwright, 477 U.S. 399 (1986) 33

Furman v. Georgia, 408 U.S. 238 (1972) 18

Gregg v. Georgia, 428 U.S. 153 (1976).....33

Kelly v. California, 129 S. Ct. 564 (2008) 20, 21

Kelly v. South Carolina, 534 U.S. 246 (2002)....*passim*

Mills v. Maryland, 486 U.S. 367 (1988).....20, 22

Mullaney v. Wilbur, 421 U.S. 684 (1975).....6

Payne v. Tennessee, 501 U.S. 808 (1991).....*passim*

Simmons v. South Carolina, 512 U.S. 154 (1994).....*passim*

Skipper v. South Carolina, 476 U.S. 1 (1986) 18

Tennard v. Dretke, 542 U.S. 274 (2004).....18

STATE CASES

Bivens v. State, 642 N.E.2d 928 (Ind. 1994).....26

Commonwealth v. Baumhammers, 960 A.2d 59 (2008).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Commonwealth v. Carson, 913 A.2d 220 (Pa. 2006) 8, 12, 19

Commonwealth v. Dougherty, 580 Pa. 183, 860 A.2d 31 (2004) 8, 9, 18

Commonwealth v. Eichinger, 915 A.2d 1122 (Pa. 2007) 27

Commonwealth v. Fahy, 512 Pa. 298, 516 A.2d 689 (1986) 28

Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28 (1991) 28

Commonwealth v. Jones, 571 Pa. 112, 811 A.2d 994 (2002) 9

Commonwealth v. Spotz, 563 Pa. 269, 759 A.2d 1280 (2002) 9

Commonwealth v. Travaglia, 200 Pa. Super. 37, 792 A.2d 1261 (Pa. Super. 2002) 10

Commonwealth v. Trivigno, 561 Pa. 232, 750 A.2d 243 (2000) 10, 15

Corcoran v. States, 774 N.E.2d 495 (Ind. 2002) 32

Sermons v. State, 417 S.E.2d 144 (Ga. 1992) 26

State v. Atwood, 832 P.2d 593 (Ariz. 1992) 26

State v. Bernard, 608 So. 2d 966 (La. 1992) 25

State v. Carter, 888 P.2d 629 (Utah 1995) 26

State v. Ketterer, 111 Ohio St.3d 70, 855 N.E.2d 48 (2006) 31, 32

State v. Metz, 887 P.2d 795 (Or. Ct. App. 1994) 26

TABLE OF AUTHORITIES – Continued

Page

State v. Nelson, 173 N.J. 417, 803 A.2d 1 (N.J. 2002) 32

State v. Scott, 92 Ohio St.3d 1, 748 N.E.2d 11 (Ohio 2001) 32

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution ..... *passim*

The Fourteenth Amendment to the United States Constitution ..... *passim*

FEDERAL STATUTES

18 U.S.C. § 3593(a) 23

28 U.S.C. § 1257(a) 1

STATE STATUTES

22 OKLA. STAT. ANN. § 984.1 23

42 Pa. C.S. § 9711(a)(1) 7

42 Pa. C.S. § 9711(a)(2) 22, 26

42 Pa. C.S. § 9711(a)(11) 4

42 Pa. C.S. § 9711(d)(7) 4

42 Pa. C.S. § 9711(e)(1) 4

42 Pa. C.S. § 9711(e)(2) 4

42 Pa. C.S. § 9711(e)(3) 28

42 Pa. C.S. § 9711(e)(8) 4

TABLE OF AUTHORITIES – Continued

Page

61 P.S. § 331.21(a)....7
ALA. CODE §§ 13A-5-57, 15-23-72....23
ARIZ. REV. STAT. ANN. CONST. ART. II, § 2.1....23
ARK. CODE ANN. § 5-4-602(4)....23
CAL. PENAL CODE § 190.3....23
COLO. REV. STAT. ANN. § 18-1.3-1201(b)....23
CONN. GEN. STAT. ANN. §§ 53a-46d, 54-220....23
DEL. CODE ANN. § 4331....23
FLA. STAT. ANN. § 921.143....23
GA. CODE ANN. § 17-10-12....23
IDAHO CODE § 19-5306....23
ILL. REV. STAT. 120/3, 120/6....23
IND. CODE § 35-50-2-9(e)....23
KAN. STAT. ANN. § 74-7333-38....23
KY. REV. STAT. ANN. § 421.520....23
LA. CODE CRIM. PROC. ANN. ART. 905.2....23
MD. CODE ANN. CRIM. LAW §§ 11-401, 11-403....23
MO. REV. STAT. § 217.762....23
MONT. CODE ANN. § 302(1)(a)(iii)....23
N.C. GEN. STAT. § 15-A833....23
N.H. REV. STAT. ANN. § 21-M:8-K....23
N.M. STAT. ANN. § 31-26-4(G)....23
NEV. REV. STAT. § 29-2261....23

TABLE OF AUTHORITIES – Continued

Page

OHIO REV. CODE ANN. §§ 2930.02, 2930.14, 2947.051 23

OR. REV. STAT. §§ 137.013, 163.150(1)(a) 23

PA. CONS. STAT. ANN. § 9711 23

S.D. CODIFIED LAWS § 24-15A-43 23

TENN. CODE ANN. § 39-13-204(c) 23

TEX. CODE CRIM. PROC. ANN. ART. 37.07 § 3(A) 23

UTAH CODE ANN. § 76-3-207(2)(a)(iii) 23

VA. CODE ANN. §§ 19.2-264, 19.2-299.1 23

WASH. REV. CODE §§ 10.95.060(3), 10.95.070 23

WYO. STAT. § 7-21-101-103 23

OTHER AUTHORITIES

Christopher Slobogin, *What Atkins Could Mean for People With Mental Illness*, 33 N.M. L. Rev. 293 (2003) 33

Diagnostic and Statistical Manual (DSM)-IV-TR 31

Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 Fordham L. Rev. 465 (2007) 33

TABLE OF AUTHORITIES – Continued

Page

John H. Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397 (2001) 19

John W. Parry, *The Death Penalty And Persons With Mental Disabilities: A Lethal Dose Of Stigma, Sanism Fear Of Violence, And Faulty Predictions Of Dangerousness,* 29 Mental Health & Disability L. Rptr. 667 (2005).....15

Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 Brook. L. Rev. 995 (2005) 33

Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 Seattle J. Soc. Just. 353 (2007) 33

Mary Ellen Gale, *Retribution, Punishment, and Death,* 18 U.C. Davis L. Rev. 973, 1031 (1985).....34

Sir Edward Coke, 3 *Institutes* 6 (6th ed. 1680) 33

Symposium: The Death Penalty and Mental Illness: Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115 (Summer, 2005).....30

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard S. Baumhammers respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Pennsylvania affirming his conviction and sentence of death.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania affirming the Allegheny County Court of Common Pleas judgments of sentence issued on May 12 and September 6, 2001, was issued on November 20, 2008, reported as *Commonwealth v. Baumhammers*, 960 A.2d 59 (2008). A copy of that opinion is attached as Appendix A. Rehearing was denied on February 24, 2009. A copy of that order is attached as Appendix C. Attached as additional material in Appendix B is the Opinion of the Trial Court denying Baumhammers' Post Trial Motions dated December 29, 2005.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgment on February 24, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History

Baumhammers was arrested on April 28, 2000, for the shootings of six (6) individuals, five (5) of whom died. Psychiatrists from the Allegheny County Behavior Clinic examined Baumhammers on May 2nd and 4th and determined that he was psychotic and suffered auditory hallucinations. DE 104,[1] TT at

[1] "DE" refers to the Docket Entry in the Court of Common Pleas of Allegheny County Pennsylvania.

1791.[2] After a May 9, 2000, competency hearing, it was determined that Baumhammers was mentally incompetent, and he was sent to Mayview State Hospital for treatment and examination. DE 18.

On September 15, 2000, the trial court found that treatment and medication had rendered Baumhammers competent, although he still suffered from schizophrenia. DE 33 at 14-15, 31 (Competency Hearing, 9/15/00). Defense counsel gave notice of intent to raise an insanity defense and identified Dr. James Merikangas as the expert who would testify in support of that defense. DE 43. Consequently, the trial court ordered that Baumhammers submit to examination by a psychiatrist of the prosecution's choosing. Dr. Michael Welner examined Baumhammers on March 22 and 23 and April 13, 2001. DE 105, TT at 2202, 2004. Dr. Welner provided the defense with an 89-page report on April 24, 2001. DE 104, TT at 2025.

Trial started with opening statements on April 27, 2001.

Besides calling witnesses to establish the uncontested facts of the shootings, the Commonwealth called several jailhouse informants who testified that Baumhammers made remarks indicating bigotry as his motive for the shootings. The defense called several psychiatrists who had treated and examined

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[2] "TT" refers to the Trial Transcript.

Baumhammers over the previous eight (8) years as well as Dr. James Merikangas and county jail correction officers to refute the informants' tales. The Commonwealth relied on Dr. Welner to rebut the insanity defense. All of the testifying psychiatrists, defense and prosecution, agreed that Baumhammers suffered from some mental illness, either delusional disorder of the persecutory type or schizophrenia.

On May 9, 2001, the jury returned a verdict finding Baumhammers guilty of five (5) counts of first degree murder, one (1) count of aggravated assault and attempted murder, two (2) counts of arson, nine (9) counts of ethnic intimidation and several counts of criminal mischief and reckless endangerment. DE 82.

After a brief penalty phase, the jury returned five (5) death sentences. The jurors found two (2) aggravating circumstances: In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense, 42 Pa. C.S. § 9711(d)(7); and the defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue, 42 Pa. C.S. § 9711(a)(11); and three mitigating factors: The defendant had no significant history of prior criminal convictions, 42 Pa. C.S. § 9711(e)(1); the defendant was under the influence of extreme mental or emotional disturbance, 42 Pa. C.S. § 9711(e)(2); and any other evidence of mitigation concerning the character and record of the defendant, 42 Pa. C.S. § 9711(e)(8). The jury found

that the aggravating factors outweighed the mitigating.

The Supreme Court of Pennsylvania affirmed the trial court's judgment of sentence on November 20, 2008. *See* Appendix A. On December 3, 2008, Baumhammers filed an Application for Reargument. On February 24, 2009, the Supreme Court of Pennsylvania denied Baumhammers' Application for Reargument. *See* Appendix C.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The issue is whether the trial court's failure to permit the defense to introduce evidence of Petitioner's parole ineligibility, and the likelihood of commutation and to instruct the jury that Pennsylvania law does not permit a defendant convicted of first degree murder to be released on parole violated Petitioner's due process and Eighth Amendment rights. This issue was raised and preserved by objection by defense counsel during trial, defense counsel's post conviction motion to the Allegheny County Court of Common Pleas and in Petitioner's brief to the Supreme Court of Pennsylvania.

2. The issue is whether the "victim impact" evidence presented at the penalty phase was unduly prejudicial and violated the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment

of the United States Constitution. This issue was raised and preserved by defense counsel's post conviction motion to the Allegheny County Court of Common Pleas and in Petitioner's brief to the Supreme Court of Pennsylvania.

3. The issue is whether the Eighth Amendment prohibits the imposition of the death penalty on a mentally ill person. This issue was raised and preserved by defense counsel's post conviction motion to the Allegheny County Court of Common Pleas and in Petitioner's brief to the Supreme Court of Pennsylvania.

The federal claims were properly presented and reviewed below and are appropriate for this Court's consideration. *See generally, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASONS FOR GRANTING THE PETITION

I. SINCE THE EVIDENCE RAISED AN INFERENCE OF BAUMHAMMERS' FUTURE DANGEROUSNESS, *SIMMONS V. SOUTH CAROLINA* ENTITLED HIM TO A JURY INSTRUCTION THAT HE WOULD BE INELIGIBLE FOR PAROLE IF SENTENCED TO LIFE IMPRISONMENT.

A. The Due Process Violation.

After a first degree murder verdict is recorded and before the jury is discharged, the trial court

conducts a separate sentencing hearing in which the jury "shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 Pa. C.S. § 9711(a)(1). Pennsylvania law forbids the release on parole of a defendant convicted of first degree murder and sentenced to life imprisonment. *See* 61 P.S. § 331.21(a). Juries are likely to misunderstand the meaning of "life imprisonment" and to believe mistakenly that a defendant sentenced to life in prison eventually may be released on parole. *See Simmons v. South Carolina*, 512 U.S. 154, 159, 169-70 & n.9 (noting that jurors overwhelmingly believe that a life sentence means that the defendant will one day be released on parole). Thus, without a clear understanding of the legal significance of a sentence of "life imprisonment," there is a reasonable likelihood that juries in Pennsylvania would vote for a death sentence rather than allow a defendant they believe to be dangerous to be paroled eventually from state prison.

In *Simmons*, this Honorable Court held that in a capital case, "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156. This Court acknowledged that the state "may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512

U.S. at 171. The Court held that the following instruction given by the trial court was inadequate: "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." *Id.* at 146.

In *Commonwealth v. Carson*, 913 A.2d 220, 273 (Pa. 2006), *cert. denied*, 128 S. Ct. 384 (2007), the Supreme Court of Pennsylvania has held that under *Simmons*' Due Process rationale, informing the jury about parole ineligibility is required only where (1) the defense requests such an instruction, and (2) the prosecution argues future dangerousness as an aggravating factor:

> In *Simmons v. South Carolina,* 512 U.S. 154, 114 S. Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality), a plurality of the United States Supreme Court would have held that, if a prosecutor argues a capital defendant's future dangerousness at a sentencing trial, the defendant may request and should be granted a jury instruction that a penalty of life in prison will render the defendant ineligible for parole. *Id.* at 170, 114 S. Ct. at 2197. This Court has held that a *Simmons* instruction is mandated only if two events occur: (1) the prosecutor must place the defendant's future dangerousness in issue; and (2) the defendant must have requested that the trial court issues the instruction. *Commonwealth*

> *v. Dougherty*, 580 Pa. 183, 860 A.2d 31, 37 (2004), *cert. denied*, 546 U.S. 835, 126 S. Ct. 63, 163 L.Ed.2d 89 (2005); *Commonwealth v. Jones*, 571 Pa. 112, 811 A.2d 994, 1004 (2002) (citing *Commonwealth v. Spotz*, 563 Pa. 269, 759 A.2d 1280, 1291 (2000), *cert. denied*, 534 U.S. 1104, 122 S. Ct. 902, 151 L.Ed.2d 871 (2002)). The failure to issue a *Simmons* charge is no basis for relief where these circumstances are not met. *Jones*, 811 A.2d at 1004.

The Supreme Court of Pennsylvania held that Baumhammers failed to meet either of the two (2) requirements for obtaining relief on the issue of whether the jury should by informed of his parole ineligibility status. *Baumhammers*, 960 A.2d at 76. First, the Supreme Court of Pennsylvania held that Baumhammers did not cite to any specific evidence which indicated a "'tendency to *prove dangerousness in the future*.'" *Kelly v. South Carolina*, 534 U.S. 246, 254 (2002) (emphasis added), *Baumhammers*, 960 A.2d at 76, and the prosecution did not raise the issue of future dangerousness. *Id.* at 74, n.24. This holding is incorrect on both points: the issue of Baumhammers' future dangerousness was both a logical inference from the Commonwealth's evidence, as the Commonwealth's own psychiatric expert, Dr. Michael Welner, suggested to the jury that Baumhammers would continue to commit crimes in the future, DE 104, TT at 2029, and the facts in this case abundantly demonstrate future dangerousness as the jury heard evidence pertaining to five (5) murders and other

violent crimes committed by Baumhammers, as well as the myriad psychiatrists who testified about the likely reemergence of his psychotic behavior without a daily regimen of psychotropic medication, the Commonwealth's expert findings of Antisocial Personality Disorder and Baumhammers' alleged feelings of racial hatred. *See* DE 106, TT at 2887. The Supreme Court of Pennsylvania's holding to the contrary reflects a refusal to implement this Court's decision in *Simmons* and warrants correction.

The Supreme Court of Pennsylvania's restrictions on parole ineligibility evidence and instructions rest on hoary decisions that have no applicability to Pennsylvania's current sentencing scheme. The Court interpreted *Simmons* narrowly as an exception to the rule which "expressly prohibited juries from being informed that life meant life without parole"; therefore, where *Simmons* did not dictate that the jury must be instructed on parole ineligibility, Pennsylvania precedent forbade it. *See Commonwealth v. Travaglia*, 200 Pa. Super. 37, 792 A.2d 1261, 1266-67 (Pa. Super. 2002) (surveying this Court's opinions and prohibiting trial court from instructing jury on parole ineligibility).

The Pennsylvania Supreme Court acknowledged in *Commonwealth v. Trivigno*, 561 Pa. 232, 750 A.2d 243, 255 (2000), that there has been "some uncertainty as to the exact instruction that a trial court should give" to the jury where the issue of future dangerousness has been placed at issue; "however, the law is clear that the court should have at least

explained that life imprisonment means that the defendant is not eligible for parole." The instruction would inform the jury of the "impossibility of parole and the possibility of commutation." *Id.* at 255. Accordingly, when a *Simmons* instruction is required, the trial court

> . . . should inform the jury that a life sentence means that a defendant is not eligible for parole, but that the Governor has the power to grant a commutation of a sentence of life or death if based on the recommendation of the Board of Pardons following a public hearing. Further, the trial court should relay any available statistical information relating to the percentage of life sentences that have been commuted within the last several years.

Id. at 256.

Counsel for Baumhammers in this case attempted to introduce just this kind of evidence. Specifically, while out of the presence of the jury, defense counsel attempted to introduce into evidence the "Declaration/ Affidavit of Nelson R. Zullinger," dated December 13, 1999 ("Penalty Phase Exhibit A"), which reviewed the number of individuals who have been sentenced since September 1978 for first degree murder and the number who have been granted commutation. Mr. Zullinger, Secretary of the Board of Pardons, stated that only one (1) person, of those who had been sentenced to life imprisonment, had her sentence commuted for a first degree murder conviction. (Governor Casey commuted the life sentence of Grace Evelyn Azzarella on April 25, 1988, so that the defendant,

then suffering with painful bone cancer, could "die with dignity."). Mr. Zullinger stated that "no other person in Pennsylvania has had a sentence commuted or has been granted a pardon or clemency for a first degree murder committed after September 13, 1978." Penalty Phase Exhibit A at ¶ 5, DE 106, TT at 2761-66, 3073-76. The prosecution argued that the type of evidence proffered in the Affidavit from the Board of Pardons is not admissible unless and until the Commonwealth raises the future dangerousness of the defendant.

The Supreme Court of Pennsylvania held that the defense's request to introduce the Affidavit from the Board of Pardons is not the equivalent of asking the court to provide a specific instruction to the jury pursuant to *Simmons*. *Baumhammers*, 960 A.2d at 75. Furthermore, the Supreme Court of Pennsylvania held that Baumhammers was not entitled to any relief under this claim as he failed to meet either of the two (2) requirements set forth in *Commonwealth v. Carson*, *supra* at 273, in that he failed to show that the prosecution placed the issue of future dangerousness before the jury and that he failed to request a *Simmons* charge. *Id.*

After the sentencing proceeding in this case, the Supreme Court of the United States decided *Kelly v. South Carolina*, 534 U.S. 246 (2002). The *Kelly* court found that the defense is entitled to a *Simmons* instruction even absent an explicit prosecutorial reference to future dangerousness. The Supreme Court of Pennsylvania failed to follow the directive of this

Honorable Court. As Chief Justice Rehnquist stated in his dissent,

> . . . it is enough if evidence introduced to prove other elements of the case has a tendency to prove future dangerousness as well. . . . Thus, the *Simmons* rule is invoked, not in reference to any contention made by the State, but only by the existence of evidence from which a jury *might infer* future dangerousness. . . . It is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make such inference.

Id. at 260-61.

In this case, evidence presented to the jury raised an implication of Baumhammers' future dangerousness to society. As in *Kelly*, the prosecution here presented evidence not only of the sheer brutality of the crimes at issue, but also evidence of other acts indicative of a violent character. These included the evidence of Baumhammers' unprovoked assault on a person in Paris, France, *see* DE 103, TT at 865-878, and his violent and manic threats to an immigrant in August of 1999. *Id.* at 885-915.[3] The evidence demonstrated Baumhammers' potential for future dangerousness, particularly with reference to Baumhammers' steady deterioration into a delusional world of mental

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[3] Dr. Sarfraz Ahmad testified that in August 1999, Baumhammers, with another man, approached Ahmad and Fazal Mubasher and angrily told them they must leave the country: "you are no good for this country. You must die. They are coming to kill you." DE 105, TT at 890.

illness since September 1993. The jury heard the testimony of eight (8) treating, qualified expert psychiatrists regarding Baumhammers' serious mental illness.

Additionally, the Commonwealth's expert, Dr. Welner, testified before the jury that he "entertained" a diagnosis that Baumhammers suffered from Antisocial Personality Disorder, which includes a pervasive pattern of disregard for and violation of the rights of others. DE 104, TT at 2029. Dr. Welner described this personality disorder in inflammatory terms, one that is "characteristic of a pattern of rule breaking and lying across the life cycle in a variety of different settings." *Id.* He specifically cited Baumhammers' brazen lying, "lifetime pattern of irresponsibility," and lack of any remorse for the victims as supporting a diagnosis of Antisocial Personality Disorder. DE 104, TT at 2030-2032. Dr. Welner claimed that Antisocial Personality Disorder is "heavily represented in the criminal population, 70%, according to the recent available resource in the criminal setting." *Id.* at 2029. Dr. Welner thereby suggested to the jury that Baumhammers would continue to commit crimes in the future. Finally, the jury also heard evidence that Baumhammers made hateful statements regarding African-Americans and Jewish women while he was incarcerated at the local county jail after his arrest. DE 103, TT at 785-87.

In the present case, the jury heard more than a lurid description of the capital crimes on trial and Baumhammers' prior violent acts. They heard psychiatrists, experts in the behavioral sciences, testify that the very mental and personality disorders that led to

the murders – whether delusional disorder or antisocial personality disorder – persisted, across Baumhammers' life cycle. At the least, the "jury might infer future dangerousness" from such evidence. *See Kelly*, 534 U.S. at 260-61 (Rehnquist, J., dissenting); John W. Parry, *The Death Penalty And Persons With Mental Disabilities: A Lethal Dose Of Stigma, Sanism Fear Of Violence, And Faulty Predictions Of Dangerousness,* 29 Mental Health & Disability L. Rptr. 667 (2005) ("Today, for instance, defendants with mental disabilities are more likely to be sentenced to death because they are viewed as dangerous than to have their sentences reduced because they are less culpable.").

The thrust of this evidence echoes the remarks of defense counsel that the jury had already heard evidence of "future dangerousness," despite the prosecution's disavowal of the same. It is reasonably likely that the jury, without having been fully informed of the true meaning of "life imprisonment" in Pennsylvania, chose the "safe" alternative of a death sentence so that they would never have to fear, at some point in the future, that a person whom it might have believed to be a dangerous, racist, antisocial, delusional, psychotic murderer would be released on parole.

The facts in this case abundantly demonstrate that "future dangerousness" was placed at issue. The jury should have been given a *Simmons* instruction from the trial court about the "impossibility of parole and possibility of commutation," as held by the Pennsylvania Supreme Court in *Trivigno*. Further, the jury

should have been allowed to consider the contents of the Affidavit of the Secretary of the Board of Pardons. The failure of the Court to give such instruction and admit such evidence violated the Due Process and Eighth Amendment rights of Baumhammers; had the jury been so informed, there would have been no prejudice to the prosecution.

At trial, defense counsel attempted to inform the jury that "life imprisonment" in Pennsylvania meant five (5) consecutive life sentences without the possibility of parole. *See* DE 106, TT at 2791, 2793, 3101, 3103, 3104 and 3106. Counsel informed the jury that a sentence of life imprisonment will assure society that Baumhammers "will die in prison," *Id.* at 3106, and "He will never come out." *Id.* at 3107. However, an issue of such importance requires a jury instruction from the Court, not just an argument of counsel. In *Kelly*, 534 U.S. at 257, this Court found that statements of counsel that the defendant would "never see the light of daylight again" and would "die in prison" were inadequate to convey a clear understanding of the defendant's parole ineligibility, and held that the defendant was entitled to his requested jury instruction. Moreover, here the defense attempted to bolster what must have sounded to a lay jury like a defense attorney's unsupported statements about the law with proof of real-world experience: the twenty (20) year record of the lack of pardons or commutations for first degree murder convicts. The defense's desperate and unsupported attempts to tell the jury that life really does mean life were a poor substitute. Accordingly,

the Court also should have given a *Simmons* instruction to the jury and admitted the defense affidavit on parole and commutations.

Pennsylvania's resistance to this Court's due process holding in *Simmons* has continued too long. Pennsylvania continues to devise new rationales for its unfair and unconstitutional refusal to inform sentencing juries of the alternative to the death penalty. By refusing to acknowledge the Commonwealth's obvious injection of the issue of future dangerousness throughout Baumhammers' trial, the Supreme Court of Pennsylvania has sought, in effect, to vitiate the *Simmons* rule. Unless corrected by this Court, the precedent established by this case will authorize Pennsylvania prosecutors who wish to evade *Simmons* to do so by the simple expedient of giving a new name to future dangerousness. This Court should not permit such persistent disregard of one of its constitutional precedents, in this or any other case.

B. The Eighth Amendment Violation.

In his concurring opinion in *Simmons*, 512 U.S. at 172-173, Justice Souter, joined by Justice Stevens, opined that the Eighth Amendment's need for heightened reliability in capital cases requires that the jury be informed about a defendant's parole ineligibility. Thus, where there is a reasonable likelihood that a juror in a capital case will misunderstand a sentencing term (such as "life imprisonment"), Justice Souter

stated that the defendant " . . . may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been 'arbitrarily or discriminatorily' and 'wantonly and freakishly imposed.' *Furman v. Georgia*, 408 U.S. 238, 249 (1972)." *Simmons,* 512 U.S. at 172-173.

None of the many Pennsylvania opinions discussing *Simmons* address at any length the separate Eighth Amendment arguments for admitting parole ineligibility instructions and evidence. *E.g., Commonwealth v. Dougherty,* 580 Pa. 183, 860 A.2d 31, 37 (2004) (defense raised Eighth Amendment issues, but Court merely applied two-part *Simmons* test and did not address Eighth Amendment issues separately). The difference in constitutional foundation matters. The Due Process rationale derives from the proposition that a capital defendant should have a fair opportunity to meet and rebut a prosecutor's arguments in favor of death. *See Simmons*, 512 U.S. at 164. Where the prosecutor does not inject future dangerousness the defense has nothing to rebut, and the *Simmons* Due Process right is not triggered.

In contrast, the "nearly limitless," *Tennard v. Dretke*, 542 U.S. 274, 285 (2004), Eighth Amendment right to present any evidence that "might serve as a basis for a sentence less than death," *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), exists regardless of whether the prosecution creates a need to rebut specific evidence or argument. Therefore, the two (2) prerequisites the Supreme Court of Pennsylvania

imposes on *Simmons* Due Process evidence should not apply.

This Honorable Court has not yet decided the issue of whether the Eighth Amendment requires a parole ineligibility instruction and the admission of evidence to that effect at every capital sentencing in states prohibiting release on parole, but its latest opinion on the *Simmons* issue suggests that the conclusion is inescapable. In *Kelly v. South Carolina*, 534 U.S. 246, both the majority and Justices Rehnquist and Kennedy in dissent acknowledged that a capital defendant's future dangerousness always will be a foremost consideration for jurors. *See also Simmons*, 512 U.S. at 162 (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); *Carson*, 913 A.2d at 287-88 (Baldwin, J., concurring) (Parole ineligibility instruction always should be given in capital cases because dangerousness bears on every sentencing decision).[4]

In this case, the failure of the trial court to give a *Simmons* instruction violated not only Baumhammers' due process rights but also his Eighth Amendment rights. As Justice Souter reasoned, the Eighth

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[4] Commentators concur. *See* John H. Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397 (2001) (relying on interviews of hundreds of capital jurors).

Amendment compels the need for such an instruction, " . . . regardless of whether future dangerousness is an issue at sentencing." *Simmons*, 512 U.S. at 172. The evidence elicited during the trial and sentencing phases of this case placed the issue of future dangerousness squarely before the jury; thus, the trial court's failure to give a *Simmons* instruction violated Baumhammers' Due Process Rights. In the alternative, even if it is determined that "future dangerousness" was not placed at issue, the trial court's failure to give a *Simmons* instruction nonetheless violated Baumhammers' Eighth Amendment rights.

II. THE "VICTIM IMPACT" EVIDENCE PRESENTED AT THE PENALTY PHASE WAS UNDULY PREJUDICIAL VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It has recently become the trend in murder trials, both capital and non-capital cases, for the victims' families to present victim impact evidence ("VIE") that far exceeds a "quick glimpse of the life" the defendant took, or "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

In 2008, this Honorable Court considered the issue of VIE in *Kelly v. California*, 129 S. Ct. 564 (2008), but ultimately denied the defendants' petitions

for certiorari. Justices Souter, Stevens and Breyer dissented from the Court's denial of the petitions for writs of certiorari. *Id.* In his dissenting opinion in *Kelly* Justice Stevens states

> the petitions now before us invite the Court to apply the standard announced in *Payne*, and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use.

Kelly, 129 S. Ct. at 567. Moreover, Justice Breyer stated:

> I understand the difficulty of drawing a line between what is, and is not, constitutionally admissible in this area. But examples can help elucidate constitutional guidelines. And in my view, the Court should grant certiorari and consider the cases in an effort to do so.

Id. at 568.

In *Payne*, 501 U.S. at 827, this Honorable Court held that the use of VIE in a capital sentencing hearing did not violate the Eighth Amendment. The multiple opinions of the majority, however, made quite clear the limitations of that holding:

> We do not hold today that victim impact evidence must be admitted, or even that it

> should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." [ ] If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

501 U.S. at 831 (O'Connor, White and Kennedy, JJ., concurring). In so doing, the concurring justices emphasized that "[t]rial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial." *Id.* Thus, while some forms of this evidence are permissible, *Payne* plainly does not provide prosecutors with *carte blanche* in the presentation of this evidence.

The classes of evidence found not to constitute a *per se* violation of the Eighth Amendment include "evidence about the victim and about the impact of the murder on the victim's family," in other words, "'a quick glimpse of the life petitioner chose to extinguish.'" *Payne*, 501 U.S. at 825, 830 (O'Connor, White and Kennedy, JJ., concurring) (quoting *Mills v. Maryland*, 486 U.S. 367 (1980). *See* 42 Pa. C.S. § 9711(a)(2) (admissible evidence includes "information concerning the victim and the impact that the death of the victim has had on the family of the victim.").

In the 18 years since *Payne* was decided, state and federal legislatures and courts have filled the vacuum created by this Court's protracted silence with statutes and judicial pronouncements allowing the admission of VIE. Of the 37 states with the death penalty, all have statutes permitting some form of VIE into their capital sentencing proceedings.[5]

The VIE in this case far exceeded "a quick glimpse of the life petitioner chose to extinguish." It was extensive and emotionally overwhelming. Three (3) relatives testified that, among other things, Gary Lee's death caused his grandmother to suffer depression and die of a broken heart and his ten year old

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[5] ALA. CODE §§ 13A-5-57, 15-23-72; ARIZ. REV. STAT. ANN. CONST. ART. II, § 2.1; ARK. CODE ANN. § 5-4-602(4); CAL. PENAL CODE § 190.3; COLO. REV. STAT. ANN. § 18-1.3-1201(b); CONN. GEN. STAT. ANN. §§ 53a-46d, 54-220; DEL. CODE ANN. § 4331; FLA. STAT. ANN. § 921.143; GA. CODE ANN. § 17-10-12; IDAHO CODE § 19-5306; ILL. REV. STAT. 120/3, 120/6; IND. CODE § 35-50-2-9(e); KAN. STAT. ANN. § 74-7333-38; KY. REV. STAT. ANN. § 421.520; LA. CODE CRIM. PROC. ANN. ART. 905.2; MD. CODE ANN. CRIM. LAW §§ 11-401, 11-403; MO. REV. STAT. § 217.762; MONT. CODE ANN. § 302(1)(a)(iii); NEV. REV. STAT. § 29-2261; N.H. REV. STAT. ANN. § 21-M:8-K; N.M. STAT. ANN. § 31-26-4(G); N.C. GEN. STAT. § 15-A833; OHIO REV. CODE ANN. §§ 2930.02, 2930.14, 2947.051; 22 OKLA. STAT. ANN. § 984.1; OR. REV. STAT. §§ 137.013, 163.150(1)(a); PA. CONS. STAT. ANN. § 9711; S.D. CODIFIED LAWS § 24-15A-43; TENN. CODE ANN. § 39-13-204(c); TEX. CODE CRIM. PROC. ANN. ART. 37.07 § 3(A); UTAH CODE ANN. § 76-3-207(2)(a)(iii); VA. CODE ANN. §§ 19.2-264, 19.2-299.1; WASH. REV. CODE §§ 10.95.060(3), 10.95.070; WYO. STAT. § 7-21-101-103. The federal statute authorizing VIE is 18 U.S.C. § 3593(a).

sister to suffer emotional and learning difficulties. DE 106, TT at 2825, 2831, 2833.

Bang Gho, Tony Pham's wife, described how their six year old son keeps asking when his father will return home. *Id.* at 2838. She then related how she heard of the shootings and arrived at the crime scene with her son before Mr. Pham's body was removed. *Id.* at 2839-41. Defense counsel noted at sidebar that the jurors were crying, even before they saw a photograph of Mr. Pham's wife crying at the crime scene. *Id.* at 2841-42. Two (2) of Anita Gordon's daughters testified to the devastating impact her murder had on their father and how their grandmother had to be moved to a nursing home because there was no one to care for her. *Id.* at 2867. Another witness said of Mr. Gordon, "His daughters are there for him and he is there for them, but honestly, you can't describe, you really can't describe the pain." *Id.* at 2872.

Witnesses testified about each victim and the impact on his family. Two (2) witnesses described the special responsibilities an oldest son has in Indian culture to support his parents and how Anil Thakur met those obligations by sending almost all his paycheck home to his parents in India. *Id.* at 2853-54. Ji-Ye Sun's seventy year old father described how his wife cried so much, that she had to have surgery to keep herself from losing her eyesight. *Id.* at 2876. Since the shooting, Mr. Sun's father feels like "he lost everything." *Id.* at 2877. Mr. Sun's wife displayed a photograph that they took on a visit to Washington, D.C. *Id.* at 2883. Of the impact on her, she said, "At

that time I just cannot eat, cannot drink, cannot sleep. And just pain and pain. That's all. I don't know. And my brain is empty. I can't remember." *Id.* at 2884.

In addition, the statements should have been excluded because they injected emotional considerations that had no relevant purpose in the proceedings. The prejudicial effect of this evidence thus outweighed its probative value. Indeed, the Supreme Court in *Payne,* 501 U.S. at 825, acknowledged the risk that the prejudicial nature of this type of evidence could render a trial fundamentally unfair. As the Louisiana Supreme Court recognized in *State v. Bernard*, 608 So. 2d 966, 972 (La. 1992), the use of victim impact testimony in the penalty phase must be strictly limited to ensure that such evidence does not unduly inflame the jury:

> [I]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

A number of state courts have concluded in the wake of *Payne* that victim impact statements are not

relevant to the capital sentencing process. *See, e.g., State v. Atwood*, 832 P.2d 593, 673 (Ariz. 1992); *Sermons v. State*, 417 S.E.2d 144, 146 (Ga. 1992); *Bivens v. State*, 642 N.E.2d 928, 956-57 (Ind. 1994); *State v. Metz*, 887 P.2d 795, 801-03 (Or. Ct. App. 1994); *State v. Carter*, 888 P.2d 629, 653 (Utah 1995). These decisions underscore the prejudicial nature of this type of evidence and the need to interpret *Payne's* holding narrowly.

The trial court tried to limit the impact of this evidence. It excluded photographs of Gary Lee's sister at his funeral, a photograph of Tony Pham's child crying at the crime scene, and a photograph of Ji-Ye Sun's family grieving. DE 106, TT at 2826-27, 2841, 2877. It instructed the jury not to be carried away by emotion. *Id.* at 3111. However, this evidence simply was overwhelming, and it deflected the jury from its constitutionally mandated task of rendering its decision on the basis of its reasoned moral response to Baumhammers' character and culpability and rendered the death sentence the unreliable outcome of the jury's emotions. It would have prevented any juror from returning a verdict based on the law and reason, not emotion.

The Supreme Court of Pennsylvania held that there was "patently no basis for the conclusion that the trial court abused its discretion by admitting such [victim impact] evidence." *Baumhammers*, 960 A.2d at 94. In its opinion, the Court emphasized VIE is statutorily admissible in the penalty phase of capital cases pursuant to 42 Pa. C.S. § 9711(a)(2) and that

"Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding," including victim impact evidence. *Commonwealth v. Eichinger*, 915 A.2d 1122, 1139 (Pa. 2007), *cert. denied*, 128 S. Ct. 211 (2007). *Baumhammers*, 960 A.2d at 80. Although VIE is admissible in Pennsylvania, clear standards should be established to limit the admission of excessive emotional factors.

It is respectfully submitted that this Court should revisit its decision in the *Payne* case and establish meaningful controls on the form and content of VIE that can be admitted in capital trials, and make clear that the Eighth Amendment and Due Process Clause of the Fourteenth Amendment preclude admission of evidence such as that presented in this case.

III. THE EIGHTH AMENDMENT PROHIBITS THE IMPOSITION OF THE DEATH PENALTY ON A MENTALLY ILL PERSON.

Whether a person is guilty is a different question than whether the person should be executed. This is particularly so when the person is severely mentally ill. All the psychiatric witnesses at trial, including the prosecution's Dr. Welner, agreed that Baumhammers suffers from the recognized mental illnesses of delusional disorder of the persecutory type or paranoid schizophrenia. *See* DE 104, TT at 1544 (Dr. Ninan);

1588 (Dr. Friedman); 1431 (Dr. Merikangas); 1630 (Dr. Keshevan); 1936 (Dr. Welner); 1791 (Dr. Martone).

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that imposing a death sentence on mentally retarded individuals violates the evolving standards of decency embodied in the Eighth Amendment's Cruel and Unusual Punishment clause. The Supreme Court of Pennsylvania has ruled to the contrary. *Commonwealth v. Faulkner*, 528 Pa. 57, 75-76, 595 A.2d 28, 38 (1991) (holding that although mental illness is a legitimate mitigating circumstance for the jury to consider, it is not an absolute bar to imposition of a death sentence) and *Commonwealth v. Fahy*, 512 Pa. 298, 317, 516 A.2d 689, 698-99 (1986) (holding that a finding of substantial mental impairment under 42 Pa. C.S. § 9711(e)(3) does not bar a death penalty imposed by a jury.).

The *Atkins* Court declined to furnish state and lower federal courts with a definitive legal definition of "mental retardation" or "mentally retarded," instead offering two (2) clinical definitions as possible options:

> The American Association on Mental Retardation ("AAMR") defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health

> and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.'
>
> The American Psychiatric Association's definition is similar: 'The essential feature of mental Retardation is significantly subaverage general intellectual functions (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.'

Atkins, 536 at 308 n.3 (citations omitted). The Atkins Court further states that an IQ of 75 is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition[,]" *Id.* at 309 n.5, and the "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318.

Additionally, the American Bar Association Section of Individual Rights and Task Force on Mental Disability and the Death Penalty recommends:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law.

Symposium: The Death Penalty and Mental Illness: Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115 (Summer, 2005). The consistency of the professional organizations' standards with state legislative and case law evidence "lends further support to [the] conclusion that there is a consensus among those who have addressed the issue." *Atkins*, 536 U.S. at 316 n.21. In the aggregate, the opinions and policy positions of respected legal and mental health organizations provide abundant evidence of a professional consensus in opposition to allowing the execution of severely mentally ill offenders.

Although Baumhammers does not fall into either of the above cited definitions of mental retardation, he should be exempted from capital punishment because he suffers from a severe mental illness and was psychotic at the time of the offense. Individuals who

are mentally ill suffer from many of the same deficiencies and limitations inherent in those individuals who are mentally retarded, and therefore, should be treated similarly in the eyes of the law and entitled to the same protections under *Atkins* and the Eighth Amendment. *See* DSM-IV-TR at 41 (diagnostic features of mental retardation), 312 (schizophrenia), 329 (delusional disorders), 345-48 (mood disorders), 136 (delirium), 519 (dissociative disorders).

There is no rational basis for imposing the death penalty on individuals with mental illnesses. Many judges presiding over capital cases have expressed doubt in non-majority opinions as to the appropriateness of executing people with severe mental disorders. In *State v. Ketterer*, 111 Ohio St.3d, 70, 87, 855 N.E.2d 48 (2006), Justice Evelyn Lundberg Stratton reluctantly concurred in the affirmance of Ketterer's death sentence because current Ohio law required her to do so. In her concurring opinion, Justice Lundberg Stratton compared mental illness to mental retardation, concluding that many of the arguments made and accepted by the Supreme Court of the United States concerning mentally retarded offenders in *Atkins* can also be made for mentally ill defendants because they share many of the same characteristics. *Id.* at 86-87. Specifically, she opined that severely mentally ill defendants, like mentally retarded defendants, "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses,

and to understand the reactions of others." *Id.* at 86 (citing *Atkins*, 536 U.S. at 318). Furthermore, she stated that there is no proof that people in either group are more likely than others to engage in criminal conduct, although there is a great deal of evidence that they frequently act impulsively rather than according to a premeditated plan. *Id.* (citing *Atkins*, 536 U.S. at 318). Justice Lundberg Stratton ultimately acknowledged that mental illness is not as easy to define and identify as mental retardation. *Id.* at 86-87 (stating, for example, that mental retardation has objective symptoms and is permanent, whereas mental illness is a much broader category with varying treatments, diagnoses, and periods of remission). However, she went on to say that modern medical and scientific knowledge may make it easier to quantify mental illness as a defense. *Id.* at 87. *See also Corcoran v. States*, 774 N.E.2d 495, 502 (Ind. 2002) (Justice Rucker dissenting opinion affirming death sentence because "the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions for the mentally ill, namely evolving standards of decency."); *State v. Nelson*, 173 N.J. 417, 803 A.2d 1, 123 (N.J. 2002) (Justice Zazzali reasoning in his concurrence that "if the culpability of the average murderer is insufficient to invoke the death penalty as our most extreme sanction, then the lesser culpability of Nelson, given her history of mental illness and its connection to her crime, 'surely does not merit that form of retribution.'"); *State v. Scott*, 92 Ohio St.3d 1, 748 N.E.2d 11 (Ohio 2001) (Justice Pfeifer dissenting to opinion

affirming a death sentence for a schizophrenic defendant based on evolving standards of decency). *See also*, Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 Brook. L. Rev. 995 (2005); Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 Seattle J. Soc. Just. 353 (2007); Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 Fordham L. Rev. 465 (2007); Christopher Slobogin, *What Atkins Could Mean for People With Mental Illness*, 33 N.M. L. Rev. 293 (2003).

In *Ford v. Wainwright*, 477 U.S. 399, 407-8 (1986), both the majority and Justice Powell in his concurring opinion, recognized that executing the insane, or mentally ill, "serves no purpose in these cases because madness is its own punishment." The execution of the insane "contributes nothing to . . . deterrence[,] . . . simply offends humanity," *Id.* at 407 (quoting Sir Edward Coke, 3 *Institutes* 6 (6th ed. 1680)), and "does not satisfy the community's quest for retribution." *Id.* at 408 (internal quotation marks omitted).

Neither sentencing a mentally ill person to death, nor his execution serves either of the principle penological justifications for the death penalty: "retribution and deterrence of capital crimes." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Steward, Powell, and Stevens, JJ.). Unless the imposition of the death penalty "measurably contributes to one or

both of these goals, it 'is nothing more than the purposelessness and needless infliction of pain and suffering and hence an unconstitutional punishment.'" *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). Retribution demands that, when the time for execution arrives, the offender be able to recognize death as the price he must pay for his culpable deeds. *See* Mary Ellen Gale, *Retribution, Punishment, and Death,* 18 U.C. Davis L. Rev. 973, 1031 (1985).

Baumhammers submits that the *Atkins* decision should be extended to individuals, like him, who are mentally ill.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of Pennsylvania should be reversed.

This, the 22nd day of May, 2009.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
RICHARD BAUMHAMMERS,
Appellant

No. 513 CAP

SUPREME COURT OF PENNSYLVANIA

960 A.2d 59; 2008 Pa. LEXIS 2078

March 5, 2008, Argued
November 20, 2008, Decided

JUDGES: MR. JUSTICE McCAFFERY. CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ. Mr. Chief Justice Castille and Messrs. Justice Eakin and Baer join the Opinion. Mr. Justice Saylor files a Concurring Opinion. Madame Justice Todd files a Concurring Opinion.

OPINION BY: McCAFFERY

OPINION

MR. JUSTICE McCAFFERY

This is a capital direct appeal from judgments of sentence imposed by the Court of Common Pleas of Allegheny County on May 12 and September 6, 2001. Because we conclude that the issues raised by Appellant are without merit, we affirm the judgments of sentence.

On April 28, 2000, during a crime spree lasting approximately two hours, Appellant, Richard Baumhammers, shot and killed Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pham, and Garry Lee. He also seriously wounded Sandip Patel, pointed his loaded pistol at George Thomas II, set fire to Mrs. Gordon's house by using an incendiary device, desecrated one synagogue by defacing it with red spray paint and shooting bullets into it, and desecrated a second synagogue by shooting bullets into it. Appellant was arrested on the day of the crime spree and was found to have in his possession a .357 caliber handgun, spent .357 caliber shell casings, live .357 caliber ammunition, two Molotov cocktails, a can of red spray paint, and a roadmap. Appellant was charged with five counts of homicide, one count of attempted homicide, one count of aggravated assault, one count of simple assault, one count of recklessly endangering another person, eight counts of ethnic intimidation, two counts of institutional vandalism, two counts of criminal mischief, three counts of arson, and one count of carrying a firearm without a license. At the time of the filings of the criminal informations, the Commonwealth gave Appellant notice of its intention to seek the death penalty and of the aggravating circumstances supporting the death penalty on which it intended to rely.

Following a competency hearing held on May 9, 2000, the trial court determined that Appellant was mentally incompetent and ordered his transfer to a state hospital for treatment. Following a subsequent

competency hearing held on September 15, 2000, the trial court determined that treatment had rendered Appellant competent to stand trial. A jury trial on the charges was thereafter held from April 27 to May 9, 2001. During trial, Appellant did not dispute that he had shot the victims; rather, he presented evidence that he had done so while suffering from a mental disease. The jury rejected Appellant's insanity defense and returned a verdict of guilty on the five counts of first-degree murder and on all of the remaining charges.

From May 10 to May 11, 2001, the penalty phase of the trial was held. The Commonwealth presented two aggravating circumstances pursuant to 42 Pa.C.S. § 9711(d)(7) and (11).[1] Appellant presented five mitigating circumstances pursuant to 42 Pa.C.S. § 9711(e)(1), (2), (3), (5), and (8).[2] The jury found that

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[1] The two aggravating circumstances were as follows: "(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;" and "(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the same time of the offense at issue." 42 Pa.C.S. § 9711(d)(7) and (11).

[2] The five mitigating circumstances were as follows: "(1) The defendant has no significant history of prior criminal convictions;" "(2) The defendant was under the influence of extreme mental or emotional disturbance;" "(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" "(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted

(Continued on following page)

the Commonwealth had proven the two aggravating circumstances, and that Appellant had proven three of the five mitigating circumstances. However, the jury also determined that the aggravating circumstances outweighed the mitigating circumstances and returned sentences of death as mandated by law. *See* 42 Pa.C.S. § 9711(c)(iv) (providing in relevant part that the verdict must be a sentence of death if the jury unanimously finds one or more aggravating circumstances that outweigh any mitigating circumstances). Sentencing on the non-capital offenses, as well as the formal imposition of the death sentences was deferred pending the preparation of a pre-sentence report. On September 6, 2001, the sentencing court formally imposed the five sentences of death and further imposed a total term of imprisonment on the non-homicide convictions of 112 ½ to 225 years. On December 29, 2005, the court denied Appellant's post-sentence motions, and Appellant filed the instant direct appeal wherein he raises sixteen issues for this Court's review, which we shall address following our mandatory review of the sufficiency of the evidence for the first-degree murder convictions.

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under the substantial domination of another person;" and "(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(1), (2), (3), (5), and (8).

I. Sufficiency of the Evidence

In all death penalty direct appeals, whether or not the appellant specifically raises the issue, this Court reviews the evidence to ensure that it is sufficient to support the conviction or convictions of first-degree murder. *Commonwealth v. Blakeney,* 596 Pa. 510, 946 A.2d 645, 651 n.3 (Pa. 2008).

> Evidence presented at trial is sufficient when, viewed in the light most favorable to the Commonwealth as verdict winner, the evidence and all reasonable inferences derived therefrom are sufficient to establish all elements of the offense beyond a reasonable doubt. In the case of first-degree murder, a person is guilty when the Commonwealth proves that: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. An intentional killing is a killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing. The Commonwealth may prove that a killing was intentional solely through circumstantial evidence. The finder of fact may infer that the defendant had the specific intent to kill the victim based on the defendant's use of a deadly weapon upon a vital part of the victim's body.

Id. at 651-52 (citations and quotation marks omitted).

Further, in reviewing whether the evidence was sufficient to support the first-degree murder conviction

or convictions, the entire trial record should be evaluated and all evidence received considered. *Commonwealth v. Cousar,* 593 Pa. 204, 928 A.2d 1025, 1032-33 (Pa. 2007), *cert. denied,* 128 S. Ct. 2429, 171 L. Ed. 2d 235 (2008). In addition, we note that "the trier of fact, while passing upon the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence." *Id.* at 1033.

Here, Appellant has not raised an issue regarding the sufficiency of the evidence; however, our independent review compels the conclusion that the evidence adduced at trial overwhelmingly supports Appellant's convictions for first-degree murder. The evidence established that at approximately 1:40 p.m. on April 28, 2000, Mt. Lebanon firefighters responded to an activated fire alarm set off at the Gordon residence at 788 Elm Spring Road, Mt. Lebanon. The responding firefighters, and police officers who later arrived at the scene, discovered at this residence the body of Anita Gordon, an Orthodox Jew, who had been shot multiple times in the chest, abdomen, and both hands, and who exhibited no signs of life. An incendiary device known as a Molotov cocktail was also discovered as having been thrown and ignited in a first-floor bedroom of the Gordon residence. During the discovery of the violence perpetrated at the Gordon residence, police began to receive reports regarding other nearby acts of violence, specifically, shootings occurring at the Beth El Synagogue, 1.3 miles from the Gordon residence, and at the Scott Towne Center, a strip mall less than one mile from

the synagogue. These reports identified the shooter as a white male driving a black Jeep.

While these reports were coming in, Officer Mary Susan Joyce was interviewing neighbors of Anita Gordon. Officer Joyce was questioning Inese Baumhammers, Appellant's mother, when Officer Joyce received a radio dispatch that the vehicle used in the reported shootings was a black Jeep registered to an individual named Baumhammers. Officer Joyce asked Ms. Baumhammers if she owned a black Jeep. Ms. Baumhammers replied that she did and that her son, Appellant herein, was then using the vehicle.

With respect to the first of two synagogue incidents, Susan Finder, a worshipper at Beth El Synagogue, testified that sometime after 1:20 p.m. on April 28, 2000, she was leaving the parking lot of the synagogue when she observed a black Jeep pull into the lot. Finder was able to identify Appellant as the driver of the Jeep. Dennis Wisniewski testified that on the day of the incident he was stopped at a red light three car lengths from the synagogue when he heard a bang and turned to see a man matching Appellant's description discharging five or six pistol rounds into the synagogue. Wisniewski testified that he then observed the shooter walk casually back to a black Jeep Cherokee. Philip Balk, a member of the synagogue, testified that at approximately 2:00 p.m., he arrived at the scene to observe that windows had been broken out and that a swastika and the word "Jew" had been spray-painted in red paint on the building. Detective Edward Adams of the Allegheny

County Police testified that when he arrived at the synagogue at approximately 2:50 p.m., he observed the broken glass and the desecration with the red spray paint. He also observed two bullet holes in some of the glass and bullet fragments in the synagogue's vestibule.

Regarding the shooting at the Scott Towne Center, Joseph Lanuka testified that at approximately 1:30 p.m. on April 28, 2000, he dropped off Anil Thakur at the India Grocery, an establishment in the shopping mall. Lanuka told Thakur that he would be back in fifteen minutes to pick him up. When Lanuka returned, he saw police entering the grocery store and Thakur's grocery bag lying on the ground. Lanuka went into the store and saw Thakur lying on the ground with three or four bullet holes in his chest. He also saw a man lying behind the counter, who was identified at trial as Sandip Patel. Thakur died from his wounds and Patel was paralyzed from his neck down as a result of the gunshots he had received. Also regarding this incident, John McClusky testified that at approximately 1:45 p.m., he heard a noise, which he ascertained were gunshots, and observed Appellant pointing a gun at an individual who ran past Appellant into the grocery store. Appellant turned and followed the man into the store; McClusky then heard three more gunshots. Appellant left the establishment, made eye contact with McClusky, and then walked slowly, calmly, and collectedly toward a lower area of the mall parking lot. McClusky then observed Appellant drive away in a normal fashion in a black

Jeep Cherokee. Jennifer Lynn Fowler also testified that she witnessed the events described by McClusky.

A second synagogue incident occurred that afternoon at the Ahavath Achim Synagogue in Carnegie, approximately 2.1 miles from the Scott Towne Center. Carole Swed testified that at approximately 2:00 p.m. she was stopped at a traffic light across the street from the synagogue. Swed heard two loud pops and turned to observe Appellant, with a calm demeanor, standing outside of the synagogue. She observed him fire several shots into the synagogue, then get into a black Jeep and drive away. Swed was able to record the license plate number of the Jeep, and she promptly provided this information to the police, whom she immediately called. Detective Edward Fisher of the Allegheny County Police testified that when he arrived at the synagogue, he observed five bullet holes in the structure, including one in a flyer advertising a meeting of Holocaust survivors that was scheduled at the synagogue.

David Tucker testified that between 2:15 and 2:30 p.m. on April 28, 2000, he was the lone diner at the Ya-Fei Chinese Restaurant in the Robinson Towne Center, a strip mall located approximately ten minutes away by car from the Ahavath Achim Synagogue. In the restaurant at the time was Ji-Ye Sun, the restaurant manager, and Thao Pak Pham, a delivery person. During this period, Appellant walked into the restaurant carrying a briefcase. Appellant and Pham had a verbal exchange, and then Tucker saw Pham begin to run. Tucker testified that

Appellant pulled a pistol from his case and shot Pham in the back as he was running past Tucker. Sun was shot in the chest. Although paramedics arrived quickly at the establishment, both Pham and Sun died from their gunshot wounds.

George Lester Thomas II testified that at approximately 2:40 p.m., he met his best friend, Garry Lee, at the C.S. Kim Karate Studio, located in the Center Stage Shopping Center, which was not a far distance from the Robinson Towne Center. Both men were warming up in the studio when Appellant entered and pointed a handgun at Thomas. Appellant did not shoot but turned the gun in the direction of Lee, who was standing next to Thomas. Appellant shot Lee twice in the chest and then calmly walked away as Thomas ran to the back of the studio in an effort to summon help. However, Lee died from his gunshot wounds. Thomas is white; Lee was black.

Diane Wenzig, the owner of a pizza shop two doors away from the karate studio, testified that she observed Appellant walk into the karate studio with a gun in one hand and a briefcase in the other. After hearing the gunshots, Wenzig instructed her son to call 911. Wenzig observed Appellant get into a black Jeep Cherokee, whose license plate number she recorded and provided to the police.

Following the report of this incident, Officer John Fratangeli of the City of Aliquippa Police Department was instructed to station himself on the Aliquippa-Ambridge Bridge along Route 51 so that he could

intercept Appellant.[3] Officer Fratangeli testified that at approximately 3:10 p.m., he observed Appellant's black Jeep Cherokee turn onto the bridge. Appellant was not driving erratically; in fact, he was driving within the speed limit and using proper turn signals. Officer Fratangeli followed Appellant's vehicle, and when assisting units arrived, he initiated a traffic stop, two blocks from another synagogue. Appellant was arrested and his .357 caliber pistol was found in a soft-sided briefcase in the Jeep. A criminologist with the Allegheny County Coroner's Office testified that forensic tests confirmed that the bullets recovered from the bodies of Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pam, and Garry Lee had all been discharged from Appellant's weapon.

At trial, the Commonwealth also introduced the testimony of Appellant's cellmates at different correctional facilities. Bobby Jo Eckles testified that Appellant told him that he had "shot a nigger" and that Appellant made other derogatory comments regarding blacks and Jews. David Brazell testified that Appellant told him that he had killed Anita Gordon "to make a statement" and that he had desecrated the Beth El Synagogue because that was where Mrs. Gordon had worshipped. Other fellow inmates testified that Appellant spoke of his anti-immigration and pro-segregation views, his desire to start a white

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[3] Aliquippa neighbors Center Township, where the karate studio is located.

supremacist party, and his hatred for all "ethnic" people.

The foregoing evidence was amply sufficient to permit the jury to conclude, beyond a reasonable doubt, that Appellant intentionally, deliberately, and with premeditation killed Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao Pak Pam, and Garry Lee. Each of these victims was unlawfully killed; Appellant committed the killings; and the mere fact that Appellant shot four of the victims in the chest, sometimes several times, was sufficient to permit the jury to find a specific intent to kill. Additional evidence of Appellant's specific intent to kill included (1) the statements he later made indicating his desire to "make a statement" by his shooting of Mrs. Gordon; (2) his disparagement of the ethnicities of the victims; and (3) his violent desecration of synagogues.

Having determined that the evidence overwhelmingly supports his first-degree murder convictions, we now turn to Appellant's claims.

II. Relaxed Waiver Rule

Although Appellant does not concede that any issue in this appeal was not timely raised and preserved below, he has anticipated, correctly, that the Commonwealth argues that many of his issues were not preserved and are thus waived. In anticipation of the Commonwealth's argument that certain of his issues are waived, Appellant contends that we should address the merits of such issues under the "relaxed

waiver rule." Appellant acknowledges that we abrogated the relaxed waiver rule in *Commonwealth v. Freeman,* 573 Pa. 532, 827 A.2d 385 (Pa. 2003), well prior to his 2006 appeal. However, because his case was tried before *Freeman's* effective date, Appellant contends that it "makes sense" that he should reap the advantages of the rule because his trial counsel **might** have anticipated its application on appeal. Appellant's Brief at 20. Further, Appellant contends that all of his issues, save one, were "raised below" in his post-sentence motions, even if not during trial or on pre-trial motions.[4] Finally, Appellant asks that we invoke our discretion to review waived claims and, in particular, consider that his claims rise to the level of "primary constitutional magnitude." *Id.* at 21.

Prior to *Freeman,* this Court would address, **in its discretion**, issues in capital appeals not preserved below pursuant to a practice we referred to as the relaxed waiver rule. *See, e.g., Freeman, supra* at 400 (citing to several capital cases where we reviewed otherwise waived issues under the relaxed waiver rule). However, in *Freeman,* we abolished this rule, holding

> that, as a general rule on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable. Such claims may be

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[4] Counsel on post-sentence motions was different from trial counsel.

> pursued under the [Post Conviction Relief Act (PCRA)], as claims sounding in trial counsel's ineffectiveness or, if applicable, a statutory exception to the PCRA's waiver provision. This general rule . . . reaffirms this Court's general approach to the requirements of issue preservation. . . . [A]n assumption has arisen that all waived claims are available for review in the first instance on direct appeal. The general rule shall now be that they are not. In adopting the new rule, we do not foreclose the possibility that a capital appellant may be able to describe why a particular waived claim is of such primary constitutional magnitude that it should be reached on appeal. Indeed, nothing . . . shall . . . call[ ] into question the bedrock principles . . . concerning the necessity of reaching fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties. Consistently with our [practice], however, we leave the specific articulation of any future exception to the actual case or controversy in which that "rare" claim arises.

Id. at 402.

Further, we made our new "rule" prospective, holding that the relaxed waiver rule would continue to apply only to those capital cases then briefed or in the process of being briefed. *Id.* at 403. Because we held that our **new** rule would apply to those cases in which the appellant's brief had not yet been filed in this Court and was not due for thirty days or more

after the May 30, 2003 filing date of *Freeman,* all cases where the appellant's brief was due to be filed after June 28, 2003, or had not been filed by that date, were subject to our **new** rule. *Id.*; *see also Cousar, supra* at 1043.

In the instant case, Appellant was tried for capital murder prior to the effective date of the new rule set forth in *Freeman.* However, Appellant filed his notice of appeal on February 28, 2006, well after the effective date of the new rule established in *Freeman.* Therefore, the relaxed waiver rule clearly does not apply to Appellant's issues, even though Appellant's trial occurred prior to the effective date of the new rule. *See Commonwealth v. Moore,* 594 Pa. 619, 937 A.2d 1062, 1066 (Pa. 2007) (holding that *Freeman* barred application of the relaxed waiver rule where the appellant was convicted in 1999, prior to *Freeman,* but the appeal was filed after the effective date of the new rule set forth in *Freeman*); and *Cousar, supra* at 1043 (holding that *Freeman* barred application of the relaxed waiver rule where the appellant was convicted in 2001, prior to *Freeman,* but the appeal was filed after the effective date of the new rule set forth in *Freeman*). Therefore, Appellant's "waived claims may be considered, if at all, only as components of a challenge to trial counsel's stewardship." *Moore, supra* at 1066.

Moreover, the specific reasons asserted by Appellant for applying the relaxed waiver rule here are easily rejected. Appellant first argues that the relaxed waiver rule should be applied because trial counsel

would have anticipated its application on appeal. However, "this Court has long emphasized that the relaxed waiver rule did not exist to permit capital defendants and their counsel to deliberately avoid raising contemporaneous objections." *Freeman, supra* at 403.

Appellant next argues that those objections not contemporaneously raised below were nevertheless "raised in the lower court" by virtue of having been set forth in post-sentence motions. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Appellant has failed to show that Rule 302(a) has ever been interpreted as meaning that issues may be raised **at any time** during the lower court proceedings in order to preserve them. Rather, it is axiomatic that issues are preserved when objections are made timely to the error or offense. *See Commonwealth v. May*, 584 Pa. 640, 887 A.2d 750, 761 (Pa. 2005) (holding that an "absence of contemporaneous objections renders" an appellant's claims waived); and *Commonwealth v. Bruce*, 207 PA Super 4, 916 A.2d 657, 671 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (Pa. 2007) (holding that a "failure to offer a timely and specific objection results in waiver of" the claim). Therefore, we shall consider any issue waived where Appellant failed to assert a timely objection.

Finally, Appellant argues that we should review even waived claims if they rise to the level of "primary constitutional magnitude." Indeed, in *Freeman*, we specifically reserved the practice of "reaching

fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties." *Freeman, supra* at 402. However, with respect to what are his "fundamental and plainly meritorious constitutional issues," Appellant references only his arguments concerning whether sentencing a mentally ill person to death and whether lethal injection constitutes cruel and unusual punishment. Appellant's Brief at 21-22; *see* discussion *infra* with respect to these issues. As shall be discussed *infra,* we do not agree that Appellant has raised any "fundamental and plainly meritorious constitutional issues." We therefore proceed to address Appellant's properly preserved substantive issues from both the guilt phase and sentencing phase of trial.

III. Change of Venue or Venire

Appellant argues that the trial court erred by not *sua sponte* ordering either a change of venue or an out-of-county venire panel despite the fact that trial counsel **specifically opposed** a change of venue or a change of the venire panel to persons outside of the county. Moreover, Appellant makes this argument despite the additional fact that the trial court, after conducting an evidentiary hearing on the issue of pretrial publicity that included testimony given by an investigator hired by the court, granted Appellant's **specific request** to have the matter tried within Allegheny County with an Allegheny County jury.

As the facts make plain, this case was one of the most notorious in the history of Allegheny County, and was extensively covered by the media.[5] Not only was there significant pre-trial local news coverage of the events of April 28, 2000, but there was also coverage concerning the impact the crimes had on Sandip Patel, who was paralyzed, and on the survivors of those who had been killed. Many news stories also concerned the state of Appellant's mental health.

Anticipating that there could be difficulties in selecting an impartial jury in such an atmosphere, the trial court conducted a "testing of the venire" hearing on February 21, 2001. That hearing established that 102 of 107 potential jurors responded that they had read about, heard and seen on TV, or otherwise had personal knowledge of the events of April 28, 2000. Seventy-five of the 102 knowledgeable potential jurors indicated that they could not be fair and impartial if selected to serve on Appellant's jury. On March 15, 2001, the court conducted a second testing of the venire hearing at which a private investigator, hired by the court to examine local news

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[5] The trial court found that between April 28, 2000, and March 3 or 4, 2001, 535 local newspaper accounts concerning the killings and related subjects appeared. Further, the court also found that during this same period, 584 accounts concerning the event were aired on four local television stations. Many of these accounts "contained prejudicial and highly inflammatory information about [Appellant] and his alleged crimes." Trial Court Opinion, dated March 26, 2001, at 5-6.

coverage of the case, testified in detail as to the extent of local news coverage of the case. This second potential jury pool reflected knowledge and attitudes similar in proportion to that of the potential jury pool of the first hearing.

The evidence set forth at the hearings gave the trial court misgivings about selecting a jury panel from Allegheny County. Trial Court Opinion, dated March 26, 2001, at 21. However, at the March 15, 2001 hearing, Appellant specifically objected to a change in venire and specifically requested that the jury be selected from the citizens of Allegheny County, explaining that his trial strategy would be best served by having a local jury. Despite its concerns, the trial court acceded to Appellant's request, noting that not to do so would simply provide Appellant with an appeal issue for which a new trial would be requested. *Id.* Nevertheless, the trial court held another pre-trial hearing on April 11, 2001, at which the trial judge conducted a colloquy with Appellant, who unequivocally stated to the court that he understood the ramifications of selecting a jury from Allegheny County, but supported his counsel's decision to oppose a change of venire. It should be noted that Appellant is a former, non-practicing attorney.

Appellant now argues, as he did in post-trial motions, that the trial court erred by (1) failing to *sua sponte* deny Appellant's objection to a change in venire; and (2) denying Appellant's **post-trial** request to hold an evidentiary hearing to consider the fairness of the trial as viewed through the testimony of

Appellant's proffered expert witness. Dr. Edward Bronstein, a professor of political science, would have purportedly testified on behalf of Appellant that it was the professor's "strong opinion that the media coverage of the case raised the most serious concerns about the fair trial rights of [Appellant]." Appellant's Brief at 26.

However, Appellant is now arguing that the trial court **erred by granting** Appellant's direct objection to any change in venue or the venire panel, an objection lodged in pursuit of a particular trial strategy devised by Appellant. At the very least, Appellant must be considered to have waived his argument, as he clearly did not raise a timely objection to the trial court's refusal to order a change in venire. Thus, despite Appellant's argument that the trial court should have ***sua sponte*** ordered a change in venire, Appellant is essentially arguing that the court erred by sustaining Appellant's own objection. Thus, his argument must be deemed waived. Because Appellant's primary argument is waived, his subsidiary argument that the trial court erred by refusing to conduct a post-sentence motion to take testimony from Dr. Bronstein is without merit.[6]

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[6] Moreover, Appellant fails to explain how Dr. Bronstein's evidence would have been substantially different from that adduced by the trial court during its pre-trial change of venire hearings.

We note further that in rejecting Appellant's post-sentence argument on this issue, the trial court specifically determined "that the record of the jury selection process established that it was possible to select a jury untainted by prejudicial pre-trial publicity. Such a jury was, in fact, selected in this matter." Trial Court Opinion, dated December 29, 2005, at 5. Here, Appellant utterly fails to dispute this determination by identifying any evidence in the record establishing or indicating that the jury **actually selected in this case** was biased or tainted by pre-trial publicity. Therefore, even if Appellant had not waived his argument, we would find no basis for relief.

In a similar vein, it is significant to note, as our now-Chief Justice has observed, that "[t]he trial judge is not an advocate, but a neutral arbiter interposed between the parties and their advocates. . . . With certain rare exceptions . . . the trial judge is not duty-bound to raise additional arguments on behalf of one party or another such that, if and when the judge fails to do so, he has 'erred.'" *Commonwealth v. Overby,* 570 Pa. 328, 809 A.2d 295, 316 (Pa. 2002) (Castille, J., dissenting); *see also Commonwealth v. Pachipko,* 450 Pa. Super. 677, 677 A.2d 1247, 1249 (Pa.Super. 1996) (noting that it is "clearly inappropriate" for a trial judge to raise an issue on behalf of a party and act as an advocate for that party). This observation simply mirrors that made by the United States Supreme Court, which determined:

> In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

Dennis v. United States, 384 U.S. 855, 875, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966) (quoted with approval in *Commonwealth v. Edwards,* 535 Pa. 575, 637 A.2d 259, 261 (Pa. 1993)). Indeed, in *Edwards,* we announced that it would be in the future ***per se*** reversible error if a judge instructs the jury concerning a defendant's right not to testify when the defendant has requested that no such instruction be given. *Edwards, supra* at 261. Similarly, it was not the place of the trial judge here to direct Appellant to pursue a different trial strategy when Appellant's chosen trial strategy was not violative of the law or our rules of procedure. In light of the above, we cannot determine that the trial court erred by sustaining Appellant's objection to a change in venue or venire.

IV. Striking of Three Jurors from the Venire Panel

Appellant argues that he is entitled to a new capital sentencing hearing because the Commonwealth's pre-trial striking from the jury panel of three "otherwise qualified jurors," who had expressed their opposition to the death penalty, allegedly resulted in the empanelling of a jury partial to the Commonwealth's request for the death sentence. Appellant's Brief at 28. Appellant notes that the United States

Supreme Court has held that "a challenge for cause cannot be sustained based merely upon a venire person's voicing of general objections to the death penalty or expression of conscientious or religious scruples against its imposition." *Witherspoon v. Illinois,* 391 U.S. 510, 521-22, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); *see also Commonwealth v. Uderra,* 580 Pa. 492, 862 A.2d 74, 81 (Pa. 2004) (quoting *Witherspoon*).

However, the record plainly shows that Appellant failed to timely object to the Commonwealth's challenges for cause to the three prospective jurors identified by Appellant as "otherwise qualified."[7] An appellant waives any issue concerning the striking of a venire person when he or she fails to object to a challenge for cause, even when the issue is "of constitutional dimension." *Commonwealth v. Peterkin,* 511 Pa. 299, 513 A.2d 373, 378 (Pa. 1986); *see also Commonwealth v. Lewis,* 523 Pa. 466, 567 A.2d 1376, 1381 (Pa. 1989) (holding that a failure to preserve an objection to the exclusion of a potential juror for cause results in waiver of the issue, even under the relaxed waiver rule); *Commonwealth v. Szuchon,* 506 Pa. 228, 484 A.2d 1365, 1379-80 (Pa. 1984) (holding that even when prospective jurors are excluded for simply

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[7] With respect to one potential juror, Edward Startari, Appellant's counsel did question the Commonwealth's challenge to this potential juror by stating, "This is cause?" The court responded to this question by stating, "Yes. No question about it." Notes of Testimony Jury Selection, 4/21/01, at 689. However, Appellant did not place an objection on the record to the Commonwealth's challenge to Startari. *See id.*

voicing a general opposition to or discomfort with the death penalty, defense counsel's failure to object to the striking for cause of such prospective jurors results in waiver of the issue). Accordingly, we conclude that this issue is waived.

V. Search of Appellant's House and Seizure of his Personal Items

Appellant contends that the police violated his rights under the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution by conducting a search of his house and effecting a seizure of personal items. Although the search was made pursuant to a search warrant as well as with the consent of Appellant's parents, Appellant argues that (1) the warrant allowing for a broad search for material was overbroad and not based on probable cause that such material was contraband or evidence of a crime; and (2) the consent for the search was invalid. Among the items seized from Appellant's house was his desktop computer. Pursuant to a subsequently issued warrant, the police examined the file contents of the computer, which revealed evidence of Appellant's racist and anti-immigrant philosophies. That evidence was later used by the Commonwealth at trial.

However, Appellant never filed a motion to suppress the evidence he now claims was impermissibly seized by the police. Pennsylvania Rule of Criminal Procedure 581 addresses the right of a criminal

defendant to move to suppress evidence alleged to have been obtained in violation of his or her rights, and sets forth the procedure attendant to the disposition of a suppression motion. Rule 581(D) requires that a suppression motion state with specificity and particularity the evidence sought to be suppressed. Rule 581(B) provides: "If timely motion [for suppression of evidence] is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived."

This Court has consistently affirmed the principle that a defendant waives the ground of suppressibility as a basis for opposition to the Commonwealth's introduction of evidence when he or she fails to file a suppression motion pursuant to our rules of criminal procedure. *See, e.g., Commonwealth v. Simmons,* 482 Pa. 496, 394 A.2d 431, 435 (Pa. 1978) (holding that the specificity requirement of the suppression rule is mandatory, and therefore the failure to object to specific evidence in a suppression motion results in waiver of any argument that such evidence should have been suppressed); *Commonwealth v. Williams,* 454 Pa. 261, 311 A.2d 920, 921 (Pa. 1973) (holding that any objection to the introduction of evidence on constitutional grounds is waived in the absence of the filing of a suppression motion pursuant to the applicable rule of criminal procedure). Accordingly, we determine that Appellant has also waived his claim that the evidence seized from his house should have been suppressed.

VI. Recording of Telephone Conversation

At trial, the Commonwealth introduced into evidence a recording of a telephone conversation made March 2, 2001, at the Allegheny County Jail between Appellant, then an inmate of the jail, and his parents, during which the parents appeared to accuse Appellant of being a racist. The Commonwealth's psychiatric expert in some part relied upon this recording in forming his opinion that Appellant had acted from racist motives rather than from a mental illness. Appellant had moved to suppress the evidence of the telephone conversation pre-trial, arguing that it violated Section 5704(14) of the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act), 18 Pa.C.S. § 5704(14), because there had purportedly been no written notification that the conversation would be recorded.[8] Appellant also

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[8] Section 5704(14)(i)(A) provides:

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
>
> (14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions:
>
> (i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph:
>
> (A) Before the implementation of this paragraph, all inmates of the facility **shall be notified in writing** that, as of the effective date of this para-

(Continued on following page)

argued that Section 5704(14) of the Wiretap Act was violated a second time when the contents of the recorded conversation were divulged to a detective and the Commonwealth's psychiatric expert.

In denying the suppression motion, the court found that the evidence established that inmates generally receive notice in two ways that their outgoing telephone conversations are recorded: (1) through written notice in the prison handbook; and (2) through a computer-generated message on the telephone itself that is audible to both the inmate and the party on the other end of the conversation. Further, the court found that evidence adduced at the hearing established that Appellant and his parents were **actually aware** that their telephone conversations were being recorded. Indeed, during the March 2, 2001 conversation, Appellant's father warned Appellant that the conversation was being recorded by prison authorities. Finally, the court determined that the contents of the conversation were properly divulged pursuant to the Wiretap Act's directive that contents of recorded conversations may be divulged in connection with "the prosecution or investigation of any crime." 18 Pa.C.S. § 5704(14)(i)(C).[9] Accordingly, the court

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graph, their telephone conversations may be intercepted, recorded, monitored or divulged.

18 Pa.C.S. § 5704(14)(i)(A) (emphasis added).

[9] Section 5704(14)(i)(C) of the Wiretap Act provides:

(C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the

(Continued on following page)

determined that the Wiretap Act had not been violated because Appellant had received prior written and aural notice – and had actual notice as well – that his telephone conversations were being recorded by prison personnel, and because the contents of the conversation were divulged in conformance with the statute.

Post-trial, Appellant's new counsel, after reviewing a copy of the prison handbook, determined that the handbook did not actually contain written notice that prison telephone conversations are recorded, as had been found factually by the suppression court. Appellant's new counsel also obtained an affidavit from the head of operations at the jail when Appellant was incarcerated there, who confirmed that the prison handbook did not contain written notice to inmates regarding the interception and recording of their telephone conversations. Based on this information, Appellant argued in post-trial motions, as he is arguing now before us, that the telephone conversation at issue was made in violation of Section 5704(14)(i)(A) of the Wiretap Act, as that section requires **written,** not other, notice. The trial court rejected this argument, noting that the fact that Appellant **actually knew** that his conversation was being recorded controlled the disposition of the issue. Further, the court determined that Section

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facility, in response to a court order or in the prosecution or investigation of any crime.

18 Pa.C.S. § 5704(14)(i)(C).

5704(14)(i)(A) of the Wiretap Act did not require written notice to every inmate individually, but only prior written notice to the existing inmates before a correctional facility could implement a program of intercepting and recording inmate telephone conversations. This determination was based on the court's reading of the subparagraph relied on by Appellant for his argument, to wit, "**Before the implementation of this paragraph**, all inmates of the facility shall be notified in writing that, **as of the effective date of this paragraph**, their telephone conversations may be intercepted, recorded, monitored or divulged." 18 Pa.C.S. § 5704(14)(i)(A) (emphasis added).[10]

Appellant now renews his arguments to this Court, contending that it was irrelevant that he was under actual notice that his telephone conversation was being intercepted and recorded, when the statute

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[10] The trial court further determined that the record showed that all participants in the telephone conversation at issue, *i.e.*, Appellant, his mother, and his father, by their knowledge that their conversation was being recorded, **consented** to the interception and recording of the conversation. Section 5704(4) of the Wiretap Act provides that it shall not be unlawful for a person to intercept a communication "where all parties to the communication have given prior consent to such interception." 18 Pa.C.S. § 5704(4). However, federal case law has held, under the Federal Wiretap Act, that inmate knowledge that telephone conversations may be intercepted and recorded **and consent** to such action are not equivalent. *See, e.g., United States v. Daniels*, 902 F.2d 1238, 1244-45 (7th Cir. 1990). Because of our disposition of this issue, we need not determine whether the trial court's alternative grounds for denying Appellant relief has merit.

required that he receive prior written notice.[11] In making this argument, Appellant relies upon our case law holding that the requirements of the Wiretap Act must be strictly adhered to and that a defendant need not establish prejudice prior to obtaining relief. *See, e.g., Commonwealth v. Hashem,* 526 Pa. 199, 584 A.2d 1378, 1381-82 (Pa. 1991) (applying a completely different section of the Wiretap Act, namely Section 5718, pertaining to disclosure to the defendant of court-authorized intercepts). We cannot agree with the conclusions Appellant reaches.

Appellant is certainly correct that because the Wiretap Act infringes upon the constitutional right to privacy, its provisions are strictly construed. *See Kopko v. Miller,* 586 Pa. 170, 892 A.2d 766, 772 (Pa. 2006). However, this principle does not compel a reviewing court to abandon all recognition of the facts before it or to ignore the principle that statutes are not to be construed in a manner that would yield an absurd result. *See* 1 Pa.C.S. § 1922(1) (providing that in ascertaining the intent of the General Assembly in the enactment of a statute, it is presumed that the General Assembly did not intend a result that is absurd or unreasonable). Simply stated, there is no basis to conclude that the privacy rights of Appellant

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[11] Appellant does not cite to any evidence that the Commonwealth **by purposeful design** misrepresented to the suppression court that which appears not to be true, to wit, that the prison handbook contains written notification that inmate telephone conversations could be intercepted and recorded.

or his parents were infringed when their March 2, 2001 telephone conversation was recorded. These individuals were actually aware that their telephone conversation was being or could be intercepted and recorded by prison authorities. Written notice to Appellant, assuming he never received any, would not have afforded him any greater protection of his right to privacy or that of his parents than the actual notice they possessed at the time of the conversation. Therefore, on this basis alone, Appellant's argument is wholly without merit.

Finally, there is no basis for Appellant's supplemental argument that Section 5704(14)(i)(C) of the Wiretap Act was violated when the contents of the telephone conversation at issue were divulged to an investigating detective and to the Commonwealth's psychiatric expert. Section 5704(14)(i)(C) provides:

> (C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

18 Pa.C.S. § 5704(14)(i)(C).

Appellant avers that Section 5704(14)(i)(C) is ambiguously written and should be interpreted in a manner that permits disclosure only "to safeguard the orderly operation of the facility." However, a plain reading of this section refutes this contention. This section provides that a recording of a telephone

conversation involving an inmate may be divulged under **any** of three instances: (1) only as is necessary to safeguard the orderly operation of the facility; (2) pursuant to a court order; or (3) in the prosecution or investigation of any crime. The March 2, 2001 conversation was divulged pursuant to the third circumstance. Appellant has failed to cite to any authority that would compel a result where a properly intercepted and recorded conversation is prohibited from being used in the prosecution or investigation of any crime. Therefore, we conclude that the trial court correctly determined that no violation of Section 5704(14)(i)(C) occurred.

VII. Cross-Examination of Dr. Merikangas

Prior to trial, Appellant's counsel consulted with forensic psychiatrist, Robert Wettstein, M.D., who on several occasions had interviewed Appellant after his crime spree. Appellant ultimately decided not to call Dr. Wettstein to testify, but instead relied principally upon the expert testimony of another psychiatric expert, James R. Merikangas, M.D., in support of his insanity defense. Dr. Merikangas had **not** consulted with Dr. Wettstein in arriving at his conclusions. At a pre-trial hearing, the trial court ruled that Dr. Wettstein's notes could not be examined or used by the Commonwealth because they consisted of attorney-client and attorney work-product protected documents. Indeed, it appears that the Commonwealth never obtained Dr. Wettstein's notes, records, or report. However, at trial and over Appellant's

objection, the trial court permitted the Commonwealth to cross-examine Dr. Merikangas concerning his failure to consult with Dr. Wettstein. Appellant specifically identifies the following testimony as prejudicial:

> Q. [Commonwealth]: He [Dr. Wettstein] interviewed [Appellant], didn't he?
>
> A. [Dr. Merikangas]: If you say so.
>
> Q. Well, what if [Appellant] on that date would have said that he wasn't hearing voices, I just hate blacks, wouldn't that be important for you to know?
>
> A. If that were the case. I don't know what happened.
>
> Q. Well, that's right, you don't know because you didn't talk to Wettstein, isn't that right?

Notes of Testimony ("N.T.") Trial, 5/4/01, at 1500. It is important to note that Appellant does not argue that by this questioning, the Commonwealth divulged the contents of Dr. Wettstein's report or notes. Rather, Appellant argues that the Commonwealth's questions "suggested that, like the prosecution's expert, Dr. Welner, Dr. Wettstein believed that [Appellant] was a malingerer and a racist." Appellant's Brief at 48.

In overruling Appellant's objection to the Commonwealth's questions pertaining to Dr. Wettstein, the trial court determined that such questioning did not violate the court's pre-trial ruling prohibiting the

Commonwealth's acquisition and use of Dr. Wettstein's report or invade the area of confidential exchanges between Appellant and Dr. Wettstein. Rather, the court determined that the questioning was relevant both to the issue of Dr. Merikangas's possible bias and the foundation for his opinion. The issue of potential bias related to previously disclosed evidence that Appellant had stated to a cellmate that he had two psychiatric experts, and that he had chosen the one that was more favorable to his case while rejecting the other. The issue of the foundation for Dr. Merikangas's opinions pertained to the degree to which this witness had explored records and psychiatric evaluations of other psychiatric professionals in order to obtain a more complete picture of Appellant's mental state. The court determined that the Commonwealth could explore these issues without delving into the substance of Dr. Wettstein's reports and records. N.T. Trial, 5/4/01, at 1496.

Appellant now argues that the information the Commonwealth was attempting to elicit from Dr. Merikangas concerned confidential communications that took place between Appellant and Dr. Wettstein, and for this reason is protected by (1) work-product and (2) attorney-client privileges, and (3) the Sixth Amendment right to effective assistance of counsel. We shall examine Appellant's theories and apply them to the facts *seriatim*.

(1) The work-product doctrine was adopted by this Court and placed into practical effect in Pa.R.Crim.P. 573(G), which reads as follows:

> [Pre-trial d]isclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

See Commonwealth v. Kennedy, 583 Pa. 208, 876 A.2d 939, 946 (Pa. 2005) (explaining that the general work-product doctrine as recognized by United States Supreme Court case law was adopted by this Court in the context of pre-trial discovery in criminal matters and delineated in Pa.R.Crim.P. 573(G)).

Further, the rules of criminal procedure pertaining to pre-trial discovery generally protect the work-product of agents hired by defense attorneys. *Id.* at 946-47. *See* Pa.R.Crim.P. 573(C)(1)(a) (providing that upon the Commonwealth's filing of a motion for pre-trial discovery, the trial court may order the defendant, subject to his or her right to be free from compulsory self-incrimination, to divulge reports or test results that the defendant intends to introduce into evidence or which were prepared by a witness whom the defendant intends to call to testify at trial).[12] Pa.R.Crim.P. 573(C) does not require the defendant to disclose reports prepared by a witness whom he or she does not intend to produce at trial.

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[12] At the time of Appellant's 2001 trial, these provisions were found at Pa.R.Crim.P. 573(C)(2)(a)(i).

In *Kennedy, supra,* we extended the principles of the work-product doctrine from the realm of pre-trial discovery to the course of the trial itself, specifically holding

> that a practical application of the work-product doctrine to trial in criminal proceedings prevents the Commonwealth from calling as a witness an agent who[m] the defense hired in preparation for trial but decided not to call as a witness at trial[,] or to use the materials prepared by the agent as evidence at trial, unless the Commonwealth can show a substantial need for such testimony and an inability to obtain the substantial equivalent of such testimony without undue hardship. Consequently, absent these showings, a trial court may not compel such testimony.

Id. at 948-49 (footnote omitted).

In the case *sub judice,* the Commonwealth never obtained any reports or notes of Dr. Wettstein, nor did the Commonwealth call Dr. Wettstein to testify. Therefore, the work-product protections that this Court has extended to defendants by rule of criminal procedure or case law were not violated. The mere questioning of one expert witness as to whether his failure to consult with another witness who was not called afforded a full view upon which to base an expert opinion does not implicate the work-product doctrine as defined and applied by this Court.

(2) Appellant's arguments concerning alleged violations of attorney-client privileges and his right to effective assistance of counsel appear to be two sides of the same coin. A criminal defendant is protected by the benefits of an attorney-client privilege; also, he or she is constitutionally entitled to effective assistance of counsel. *Commonwealth v. Chmiel,* 558 Pa. 478, 738 A.2d 406, 422-23 (Pa. 1999). Our Superior Court, based on federal case law, has determined that the attorney-client privilege in criminal matters extends to communications made between the defendant and an agent hired by the defendant's attorney to provide legal assistance. *Commonwealth v. Noll,* 443 Pa.Super. 602, 662 A.2d 1123, 1126 (Pa.Super. 1995). The court stated, "This privilege protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. This privilege *only* applies where the [defendant's] ultimate goal is legal advice." *Id.* (citing *In re Grand Jury Matter,* 147 F.R.D. 82, 84 (E.D.Pa.1992); emphasis in original).

Notably, Appellant does not suggest or argue how the Commonwealth obtained and then divulged to the jury any legal advice given by Dr. Wettstein as an agent for Appellant's attorney. Again, the Commonwealth never obtained any reports or notes of Dr. Wettstein, nor did the Commonwealth call Dr. Wettstein to testify, nor did the Commonwealth introduce evidence of Dr. Wettstein's advice to Appellant, if he gave any, through any other witness. There is no basis for the claim that Appellant's attorney-client

protections were violated by the Commonwealth's cross-examination of Dr. Merikangas.

(3) With regard to a criminal defendant's right to effective assistance of counsel within the context of the issue Appellant raises herein, the Third Circuit Court of Appeals has stated:

> The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.

United States v. Alvarez, 519 F.2d 1036, 1046-47 (3d Cir. 1975).

The *Alvarez* court also couched its concern over such disclosures in terms that related to violation of

the attorney-client privilege. Indeed, *Alvarez* has been interpreted as reading a broad attorney-client privilege into the Sixth Amendment requirement of effective counsel. *See Noggle v. Marshall,* 706 F.2d 1408, 1413 (6th Cir. 1983); *see also State v. Mingo,* 77 N.J. 576, 587, 392 A.2d 590, 595-96 (1978) (finding a similarity between the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel, and holding that reliance upon the confidentiality of an expert's advice is a critical aspect of a defense attorney's ability to consult with and advise his or her client).[13] Hence, Appellant's arguments concerning alleged violations of attorney-client privileges and his constitutional right to effective assistance of counsel are essentially the same.

As with our determination that the Commonwealth's cross-examination of Dr. Merikangas did not offend Appellant's right to attorney-client privileges, for the same reasons, Appellant's argument invoking the Sixth Amendment right to effective counsel would not have any merit even if we were to decide the question of when such right is implicated, which we

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[13] However, other courts have disputed that there is a constitutional implication when the prosecution calls as a witness a psychiatric expert consulted by the defendant, and have further refused to recognize a link between the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel. *See, e.g., Noggle, supra* at 1413-15 (and cases cited therein); and *People v. Spiezer,* 316 Ill. App. 3d 75, 87-88, 735 N.E.2d 1017, 1025-26, 249 Ill. Dec. 192 (2000) (and cases cited therein, rejecting the *Alvarez* Sixth Amendment analysis).

decline to do at this time. The record is clear that the Commonwealth did not have access to Dr. Wettstein's notes or reports, did not introduce them into evidence, and did not call Dr. Wettstein to testify. Thus, nothing of record indicates any interference with Appellant's counsel's right or ability to rely upon the confidential communications of an expert retained but not called to testify. Accordingly, Appellant's Sixth Amendment argument lacks the factual predicate the case law he cites in support of his argument would require for establishing relief. Therefore, we determine that none of the theories Appellant has advanced in support of this issue has merit.

VIII. Cross-Examination of Dr. Merikangas as Due Process Violation

Appellant next argues that the Commonwealth violated Appellant's due process rights when the Commonwealth posed the following question to Dr. Merikangas on cross-examination: "Well, what if [Appellant] on that date would have said that he wasn't hearing voices, I just hate blacks, wouldn't that be important for you to know?" N.T. Trial, 5/4/01, at 1500. Appellant contends that this question violates his due process rights because the question lacked a good faith basis in the evidence, citing *Commonwealth v. Smith,* 580 Pa. 392, 861 A.2d 892, 896 (Pa. 2004). In *Smith,* we reversed a death sentence and remanded for a new penalty hearing because the prosecutor, during the penalty phase of trial, referenced the fact that the appellant had been

convicted of assaulting a fellow prisoner with a weapon in order to establish that the appellant posed a danger to the prison population. However, no competent evidence had been introduced at trial establishing the fact of this conviction. We determined that an examination of the record revealed that the error was not harmless.[14] Here, Appellant argues that he is entitled to a new trial on guilt because the prosecutor's question assumed a fact not in evidence, to wit, that Appellant had told Dr. Wettstein that he did not have hallucinations but merely hated blacks.

At the very most, the Commonwealth's cross-examination of Dr. Merikangas may have suggested, by this one question, that Dr. Wettstein, like Dr. Welner, had determined that Appellant had killed the victims because of his racist views rather than while suffering from a mental disease sufficient to rise to the level of insanity. Thus, the Commonwealth's question arguably assumed a fact not in evidence. However, Appellant never objected to the question, except to the extent that he had previously objected to the Commonwealth's general line of questioning that referenced Dr. Wettstein, which objection was based on the trial court's pre-trial ruling that the Commonwealth could not have access to Dr. Wettstein's report

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[14] We observe that although the appellant in *Smith* did not object to the prosecutor's remark, we determined that the issue could be reviewed under the relaxed waiver doctrine as the case preceded the effective date of the *Freeman* abolition of that doctrine. *Smith, supra* at 896 n.2.

or records. Appellant never lodged an objection specifically to the question at issue, nor did he lodge one on the grounds that the Commonwealth's questions assumed a fact not in evidence or were violative of Appellant's due process rights. Accordingly, we determine that this issue is waived. *See May, supra* at 761 (holding that the absence of a specific contemporaneous objection renders the appellant's claim waived).

IX. Denial of Right to Present Mitigating Evidence

Appellant next argues that his right to present mitigating evidence was improperly curtailed by the trial court. At a penalty hearing, a capital defendant may present relevant evidence in mitigation. 42 Pa.C.S. § 9711(a)(2); *May, supra* at 765. Evidence is relevant to mitigation if it is probative of any of the enumerated mitigating circumstances set forth at 42 Pa.C.S. § 9711(e). Although Appellant presented evidence to the jury regarding five mitigating circumstances, his present argument concerns only the mitigating circumstances described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental or emotional disturbance, and (e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. With respect to the argument Appellant now raises, we note that "[t]he admissibility of evidence, including evidence proffered at the penalty phase of a capital

trial, is within the discretion of the trial court, and such rulings will form no basis for appellate relief absent an abuse of discretion." *Commonwealth v. Mitchell,* 588 Pa. 19, 902 A.2d 430, 459 (Pa. 2006).

Appellant's argument has two components. In the first, Appellant contends that the trial court abused its discretion by refusing to allow sentencing phase testimony by Christine Martone, M.D., the chief psychiatrist at the Allegheny County Behavior Clinic, an arm of the Allegheny County Court of Common Pleas. In the second, Appellant contends that the court abused its discretion by precluding the publication to the jury of mitigating evidence in the form of a redacted portion of the March 2, 2001 recorded telephone conversation between Appellant and his parents, during which the parents expressed their opinion that Appellant's criminal actions stemmed from his mental illness.

(A) Dr. Martone

Dr. Martone's responsibilities to the court of common pleas require that she evaluate defendants for competency and for dispositional recommendations after a finding of guilt. In her official capacity, Dr. Martone examined Appellant five times after the shootings, the first time being on May 2, 2000, only four days after the shootings occurred. It was Dr. Martone who initially determined that Appellant was not competent to stand trial.

During the guilt phase of trial, the trial court denied, on conflict of interest grounds, Appellant's request that Dr. Martone testify regarding Appellant's alleged insanity.[15] However, the court did allow Appellant to question Dr. Martone concerning her psychiatric examination and findings. Appellant's questions to Dr. Martone concerned her examination of Appellant on two occasions in May 2000. Dr. Martone testified that, based on those examinations, she had diagnosed Appellant with schizophrenia of the paranoid type and had determined that he suffered from auditory hallucinations.

At the penalty phase of trial, Appellant sought to present similar and/or additional testimony from Dr. Martone[16] to address the mitigating factors described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental or emotional disturbance, and 42 Pa.C.S. § 9711(e)(3), concerning whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, the court refused

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[15] We note that at a sidebar conference, Dr. Martone represented to the court that she never examined Appellant for insanity, but only for competence to stand trial. N.T. Trial, 5/5/01, at 1760.

[16] Appellant's argument fails to set forth the substance of the testimony he had hoped to elicit from Dr. Martone or how such testimony would have been different from that given by Dr. Martone during the guilt phase of trial. As shall be discussed later in the text, this is a significant omission.

Appellant's request because it determined that allowing Dr. Martone, a court employee, to testify for either Appellant or the Commonwealth at this point of the trial would represent a conflict of interest between the court's neutrality and the interests of the litigants. Additionally, the court was further concerned that if other inmates became aware that Dr. Martone could be called to testify, they would be reluctant to speak openly to her. The court also noted that Dr. Martone had not examined Appellant for sanity, but rather only for competence to stand trial, and that Appellant had at his disposal several psychiatric expert witnesses who had testified for Appellant during the guilt phase of trial and who would be available to testify during the penalty phase of trial. Moreover, the court ruled that Appellant **could** read Dr. Martone's guilt-phase testimony to the jury during the penalty phase and could present argument based on that testimony. N.T. Trial, 5/9/01, at 2748-51.[17]

Appellant now argues that the court abused its discretion by refusing to permit Dr. Martone to testify at the penalty phase of trial. First, Appellant contends that the ruling violated a local rule of criminal procedure, All.C.R.Crim.P. 300.31, which provided:[18]

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[17] The court also opined on the record that it believed that it had initially erred by allowing Dr. Martone to testify during the guilt phase of trial and was "not going to repeat [this] error." N.T. Trial, 5/9/01, at 2752.

[18] On July 27, 2007, All.C.R.Crim.P. 300.31 was rescinded.

> In the trial of any homicide case, after a verdict of Murder of the First Degree is recorded and the court proceeds to the determination of whether a sentence of life imprisonment or the death penalty should be duly imposed, as required by 42 Pa.C.S. § 9711, the court may, upon application of the defense, permit the calling of Behavior Clinic representatives in mitigation.

Second, Appellant refutes the reasoning that Dr. Martone's testimony would have represented a conflict of interest because Dr. Martone had already testified during the guilt phase of Appellant's trial. Additionally, Appellant contends that the court's fear that defendants would be less likely to speak with Behavior Clinic psychiatrists if they knew that these individuals might later testify, is unfounded if such testimony would be beneficial to the defendants, as purportedly Dr. Martone's testimony would have been for Appellant. Appellant also notes that Dr. Martone had testified in 1995 at the penalty phase of one other capital defendant tried in the Allegheny County Court of Common Pleas, as evidenced by our discussion in *Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52, 72-74 (Pa. 2003).[19]

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[19] However, it is not clear from *Fears* what the circumstances were surrounding Dr. Martone's testimony during that proceeding, *i.e.*, whether the defendant had no other witness to testify regarding all of the matters about which Dr. Martone testified in that case.

Third, although Appellant acknowledges that during the penalty phase of his trial he presented the testimony of two other psychiatric experts for support of the mitigating factors about which he wanted Dr. Martone to testify, he contends that Dr. Martone's testimony would not have been cumulative of this testimony. Appellant contends that Dr. Martone's testimony would have carried greater credibility with the jury than Appellant's hired witnesses because she would have been purportedly viewed by the jury as a "neutral" witness. Moreover, unlike Appellant's other experts, Dr. Martone examined Appellant near-immediately after the shootings. Additionally, Appellant alleges that his testifying experts were not familiar with the "standards" of the mitigating factors set forth at 42 Pa.C.S. § 9711(e)(2) and (3), even though they testified that in their professional opinions, Appellant met those standards. *See* Appellant's Brief at 59. We shall address these three arguments *seriatim*.

First, as is plain from its words, now-repealed Allegheny County Criminal Rule 300.31 placed the determination as to whether a Behavior Clinic representative would testify upon a defense application within the sound discretion of the trial court; the rule did not mandate that the court grant all requests made under the rule. Therefore, there is no violation of the rule absent a showing of an abuse of discretion. Moreover, Appellant never cited this rule to the court as a basis for his argument that Dr. Martone should

testify; Appellant is raising this theory for the first time on appeal. *See* N.T. Trial, 5/9/01, at 2746-52.

Second, Appellant's argument concerning the trial court's stated reasoning for not allowing Dr. Martone to testify does not compel the conclusion that the trial court abused its discretion; in fact, it compels the opposite conclusion. In *Commonwealth v. Widmer,* 560 Pa. 308, 744 A.2d 745 (Pa. 2000), we reiterated the well-known definition of "abuse of discretion" as follows:

> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Id. at 753.

Here, Appellant does not establish that the court's reasoning was based on prejudice, personal motivations, or capricious or arbitrary actions; rather, Appellant simply disagrees with the court's reasoning. The record plainly shows that the court had

serious and reasonable concerns with allowing any litigant to call Dr. Martone to testify, given her position with the court and her ongoing, critical duties, which could be jeopardized should she be subject to being called as a witness without sufficient cause. Further, the record shows that the court took into consideration the fact that Appellant had at least three other witnesses qualified to testify as to the same mitigating circumstances for which Appellant wished to call Dr. Martone. Finally, the court observed that the jury already had the benefit of Dr. Martone's testimony, and that Appellant would be free to publish to the jury, during the penalty phase, the substance of that testimony. Thus, there is no basis in the record to conclude that the court's determination that Dr. Martone should not testify in the penalty phase, based on a potential conflict of interest, was based on partiality, prejudice, bias, or ill will.[20]

Finally, Appellant's argument that Dr. Martone's testimony would not have been cumulative of that of his two psychiatric experts who testified during the penalty phase of trial is not persuasive. Notably, Appellant does not indicate how Dr. Martone's testimony would have differed significantly from that of

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[20] We also note that Appellant did not address the Commonwealth's argument that it would be fundamentally unreasonable to accept Appellant's position that Dr. Martone should be available to testify **only** when her testimony is beneficial to a defendant.

his other witnesses, or indeed from that testimony Dr. Martone had already given the jury during the trial phase and which was available for re-publishing to the jury during the penalty phase. Rather, the differences Appellant cites to involve two other aspects: (1) the fact that Dr. Martone had actually examined Appellant near-immediately after the crimes in May 2000, unlike his other two witnesses; and (2) Dr. Martone would have been considered by the jury as a "neutral" witness instead of one biased because of being hired by the defense or, in the case of Matcheri S. Keshavan, M.D., by being Appellant's regular treating psychiatrist.

With respect to the fact that Dr. Martone had examined Appellant in May 2000, we note that the testimony Dr. Martone had already given to the jury involved precisely her examination of Appellant in May 2000, and her findings from those examinations. Appellant does not explain how Dr. Martone would have presented anything new had she been allowed to testify during the penalty phase. Indeed, the record establishes that during the penalty phase, Appellant presented only truncated versions of the testimony of his expert psychiatric witnesses, Drs. Keshevan and Merikangas, because their guilt-phase testimony was incorporated by reference at the penalty phase. *See* N.T. Trial, 5/10/01, at 2924-25 and 2944. Moreover, Appellant had the opportunity to call to testify, but chose not to do so, Laszlo Petras, M.D., a hospital staff and Beaver County Jail psychiatrist, who had actually evaluated Appellant **on the day of the**

murders, and who had testified for Appellant during the guilt phase of trial.

With respect to Dr. Martone's neutrality, it is only speculative that the jury might have considered her a more persuasive witness, particularly as her examination of Appellant was limited to no more than five encounters and was expressly confined to the question of whether Appellant was competent to stand trial. By contrast, Dr. Keshavan had treated Appellant for mental illness for seven years prior to the shootings. Both Dr. Keshavan and Dr. Merikangas described the severity of Appellant's mental illness and the potentially exacerbating effect on his mental illness of Appellant's not taking his medications, which Appellant posited, with some evidence, was the case at the time of the crime spree.

Further, with the witnesses he presented at the penalty phase, Appellant **carried** his burden of proving to the jury the mitigating circumstance described at 42 Pa.C.S. § 9711(e)(2), concerning whether the defendant was under the influence of extreme mental or emotional disturbance. Thus, the absence of Dr. Martone's testimony regarding this mitigating factor did not result in prejudice to Appellant. In addition, the alleged "bias" of Drs. Keshavan and Merikangas and the fact that they did not examine Appellant close to the time of the crimes proved no impediment to Appellant in proving this mitigating circumstance.

Appellant did not prove the mitigating circumstance described at 42 Pa.C.S. § 9711(e)(3), concerning

whether the defendant had a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Appellant contends that Dr. Martone's testimony "would have helped establish this" mitigating factor. Appellant's Brief at 59. However, Appellant sets forth absolutely no basis for this conclusion. Again, Appellant does not indicate what testimony Dr. Martone would have provided to help establish the subsection (e)(3) mitigating factor. Further, Appellant does not indicate how Dr. Martone would have helped achieve Appellant's goal of establishing this mitigating factor when she had examined Appellant only to determine competency to stand trial, not for a general assessment of sanity.

There is no questioning the importance of a capital defendant's right to present mitigating evidence at the penalty phase of trial. However, in light of the above discussion, we must conclude that the trial court did not abuse its discretion by denying Appellant's request to present the testimony of Dr. Martone.

(B) March 2, 2001 Telephone Conversation

Appellant argues that the court abused its discretion by precluding the publication to the penalty-phase jury of the portion of the March 2, 2001 recorded telephone conversation between Appellant and his parents where the parents apparently expressed their opinion that Appellant's acts had been caused by mental illness (for convenience, this

portion of the telephone conversation shall hereafter be referred to as "the mental illness discussion"). The genesis of this argument lies in the trial court's allowing the prosecution, during the rebuttal portion of the guilt phase of trial, to publish to the jury a redacted portion of the March 2, 2001 recorded telephone conversation that contained the accusation by Appellant's parents that Appellant was a racist. The parents' accusation was based on Commonwealth evidence, by this point shared with the defense, that while in prison, Appellant had autographed for another inmate newspaper or magazine articles on controversial racial issues and had made racist remarks in conversation with this inmate. The Commonwealth sought publication of the redacted portion of the March 2, 2001 telephone conversation to corroborate the truth of the inmate's testimony regarding these events based on Appellant's admission on the tape that he had engaged in this conduct. Additionally, the Commonwealth sought to bolster its case that Appellant had committed the crimes because of his racism and not because of insanity, based on Appellant's failure to deny his parents' charge that he was a racist. The trial court redacted the telephone conversation to conform, at least in substantial part, with Appellant's specific objections to publishing other portions of the conversation to the jury.[21] N.T. Trial, 5/8/01, at 2455, 2460, 2500.

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[21] These unpublished portions of the conversation involved discussion of the death penalty and Appellant's legal counsel. N.T. Trial, 5/8/01, at 2455, 2460.

During the penalty phase, the trial court denied Appellant's request to publish to the jury the mental illness discussion, which had not been previously disclosed to the jury. The basis for the trial court's ruling was that the mental illness discussion constituted inadmissible hearsay, as Appellant was attempting to use this evidence, constituting prior **consistent** statements, to prove the truth of the matter asserted.[22] (Appellant's parents testified during the penalty phase, and expressed their opinion that their son was mentally ill and had acted under the influence of this illness.) However, the court did permit Appellant to use the transcript of the mental illness discussion to refresh the recollection of Appellant's father, during the father's penalty-phase testimony.

In arguing that the court abused its discretion by its ruling, Appellant fails to address the basis for the court's determination. Rather, Appellant contends that the mental illness discussion should have been entered into evidence pursuant to Pa.R.E. 106. Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction **at that time** of any other part or any other writing or recorded statement which ought in

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[22] By contrast, the trial court permitted the redacted portion of the telephone conversation during the guilt phase of trial pursuant to Pa.R.E. 803(25), as admissions by a party opponent, a hearsay exception. N.T. Trial, 5/8/01, at 2466, 2479-80.

> fairness to be considered **contemporaneously** with it.

Pa.R.E. 106 (emphasis added).

As can be seen from a plain reading of Rule 106, Appellant's argument has no merit. Appellant is not arguing that the court abused its discretion by failing to allow the mental illness discussion to be read to the jury **at the time** the Commonwealth published to the jury the redacted portion of the March 2, 2001 telephone conversation **during the guilt phase of trial**. Rather, Appellant is arguing that the trial court abused its discretion by refusing to allow the publication of the mental illness discussion at the penalty phase of trial, a point in time well removed from the time of the publication of the material that Appellant now argues requires consideration. Accordingly, Rule 106 is not implicated at all. In addition, Appellant makes no argument as to how the mental illness discussion would have helped him establish the mitigating factor described at 42 Pa.C.S. § 9711(e)(3).

Finally, we note that the trial court's ruling was correct. In general, prior consistent statements, as they constitute hearsay, are admissible under only very limited circumstances. Pennsylvania Rule of Evidence 613(c) provides:

> (c) **Evidence of prior consistent statement of witness.** Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine

> the witness about the statement, and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Pa.R.E. 613(c).

The comment to this rule relevantly provides that "under Pa.R.E. 613(c), a prior consistent statement is always received for rehabilitation purposes only and not as substantive evidence." *See Commonwealth v. Counterman,* 553 Pa. 370, 719 A.2d 284, 301 (Pa. 1998) (stating: "As a general rule, a prior consistent statement is hearsay, and its admissibility is dependent upon an allegation of corrupt motive or recent fabrication. Additionally, such statements have been admitted in response to an allegation of faulty memory.") (citations omitted). Here, Appellant does not argue that the mental illness discussion should have been published to the jury to rehabilitate the same testimony given by Appellant's parents during the penalty phase of trial.

For all of the above reasons, Appellant's argument regarding the mental illness discussion is wholly without merit.

X. Evidence of Parole Ineligibility (*Simmons* Charge)

In his next argument, Appellant contends that "[s]ince the **evidence** raised an inference of [Appellant's] future dangerousness, the [trial] court's failure to permit the defense to introduce evidence of [Appellant's] parole ineligibility, and the likelihood of commutation and to instruct the jury that Pennsylvania law does not permit a defendant convicted of first-degree murder to be released on parole violated [Appellant's (1)] due process and [(2)] Eighth Amendment rights." Appellant's Brief at 64; emphasis added.

Appellant first contends that the trial court erred by failing to give the jury what is referred to as a *Simmons* instruction, *i.e.,* that a life sentence means life imprisonment without the possibility of parole. We have described the *Simmons* instruction, and our law regarding when a criminal defendant is eligible for relief with respect to same, as follows:

> In *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality), a plurality of the United States Supreme Court would have held that, if a prosecutor argues a capital defendant's future dangerousness at a sentencing trial, the defendant may request and should be granted a jury instruction that a penalty of life in prison will render the defendant ineligible for parole. *Id.* at 170, 114 S.Ct. at 2197. This Court has held that a *Simmons* instruction is mandated only if two events occur: (1) the prosecutor must place the

> defendant's future dangerousness in issue; and (2) the defendant must have requested that the trial court issue the instruction. *Commonwealth v. Dougherty,* 580 Pa. 183, 860 A.2d 31, 37 (2004), *cert. denied,* 546 U.S. 835, 126 S.Ct. 63, 163 L.Ed.2d 89 (2005); *Commonwealth v. Jones,* 571 Pa. 112, 811 A.2d 994, 1004 (2002) (citing *Commonwealth v. Spotz,* 563 Pa. 269, 759 A.2d 1280, 1291 (2000), *cert. denied,* 534 U.S. 1104, 122 S. Ct. 902, 151 L.Ed.2d 871 (2002)). **The failure to issue a *Simmons* charge is no basis for relief where *these* circumstances are not met.** *Jones,* 811 A.2d at 1004.

Commonwealth v. Carson, 590 Pa. 501, 913 A.2d 220, 273 (Pa. 2006), *cert. denied,* 128 S. Ct. 384, 169 L. Ed. 2d 270 (2007) (emphasis added).

As can be gleaned from the manner in which Appellant raises his argument, he does not allege that **the prosecution** had raised the issue of future dangerousness to the jury. Rather, he argues that the issue was brought forth to the jury by the nature of **the** general **evidence itself**. Specifically, he contends that the extensive evidence concerning his mental illness given by eight mental health experts (seven of whom had testified on behalf of Appellant) had established the issue of future dangerousness in the minds of the jury. With respect to the evidence given by the Commonwealth's mental health witness, Dr. Welner, Appellant notes that this witness opined that Appellant suffers from a personality disorder shared with perhaps 70% of the criminal population that is

characterized by "a pattern of rule breaking and lying," and that Appellant in particular has demonstrated a "lifetime pattern of irresponsibility." *See* Appellant's Brief at 70. Appellant also notes the extensive evidence introduced at trial that highlighted his racist views.

However, the evidence Appellant cites does not specifically indicate "a tendency to **prove dangerousness in the future**." *Kelly v. South Carolina,* 534 U.S. 246, 254, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002) (emphasis added).[23] For example, in *Kelly,* a case decided after Appellant's trial, the United States Supreme Court determined that a *Simmons* instruction was required where the prosecutor (1) adduced

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[23] *Kelly* affirmed and further clarified the United States Supreme Court's holding in *Simmons.* The Court held that a *Simmons* instruction, when requested by the defense, is required by due process when the jury hears evidence of a defendant's propensity for violence such that it would reasonably "conclude that [the defendant] presents a risks of violent behavior whether locked up or free, and whether free as a fugitive or a parolee." *Kelly, supra* at 253-54. Thus, while *Simmons* determined that due process concerns are implicated when the prosecutor argues future dangerousness, *Kelly* appears to hold that relevant due process concerns may be triggered when the **evidence** establishes future dangerousness. *See Kelly, supra* at 260 (Rehnquist, C.J., dissenting). However, the majority opinion in *Kelly* was based on the prosecutor's evidence **and** argument. *See Kelly, supra* at 253 ("the evidence and argument . . . [show] that future dangerousness was . . . an issue in this case") (citation and quotation marks omitted). Thus, by its evidence and argument, the prosecution in *Kelly* placed the issue of future dangerousness before the jury.

testimony that the defendant, following his arrest, created a shank while in prison and had made an escape attempt that included a plan to lure a female guard into his cell to be used as a hostage; (2) adduced testimony from a psychologist that the defendant was a sadist as a child and had developed an inclination to kill anyone "who rubbed him the wrong way;" (3) argued to the jury that the defendant was dangerous and unpredictable while referring to him as "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid;" and (4) opined to the jury that "murderers will be murderers[, and the defendant] is the cold-blooded one right over there." *Id.* at 248-50. By contrast, in the case *sub judice,* the Commonwealth did not present evidence establishing Appellant's future dangerous propensities. The evidence Appellant cites is not even remotely similar in character to the evidence in *Kelly.* Essentially, the evidence Appellant cites indicates only that he will continue to suffer from his mental disorders, making him, according to Dr. Welner, a liar, a rule-breaker, and irresponsible. This is not evidence of future dangerousness, or evidence of a "demonstrated propensity for violence," triggering the need for a *Simmons* instruction. *See Kelly, supra* at 253. Additionally, the Commonwealth did not raise the issue of future dangerousness by its argument to the jury, nor does Appellant contend that it did.[24]

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[24] Our independent review of the Commonwealth's closing argument establishes that the Commonwealth did not raise the

(Continued on following page)

More importantly, Appellant never specifically requested a *Simmons* instruction. Rather, he asked the trial court to allow him to publish to the jury an affidavit by Nelson R. Zullinger, Secretary of the Board of Pardons, which purportedly averred that since September 13, 1978, only one person sentenced to life imprisonment in the Commonwealth has ever had a sentence commuted or been granted clemency or a pardon. Appellant's Brief at 67. The trial court denied Appellant's request, holding that such evidence should not come in unless the Commonwealth raised the issue of future dangerousness. However, a request to introduce such evidence is not the equivalent of asking the court to provide a specific instruction to the jury pursuant to *Simmons*.

Accordingly, Appellant has failed to meet either of the two requirements for obtaining relief on the issue of whether a jury should be instructed as to parole ineligibility, set forth, *inter alia,* in *Carson, supra* at 273. That is, Appellant has failed to show that the Commonwealth had placed the issue of future dangerousness before the jury and that he had requested a *Simmons* charge. Therefore, Appellant is not entitled to any relief under his due process claim. *Carson, supra* at 273.

In the second prong of his argument, Appellant contends that he was entitled to introduce into

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issue of future dangerousness. *See* N.T. Trial, 5/11/01, at 3079-88.

evidence the affidavit of Mr. Zullinger pursuant to Appellant's rights under the Eighth Amendment to the United States Constitution. Appellant acknowledges that the United States Supreme Court has never ruled that the Eighth Amendment requires a parole ineligibility instruction and the admission of evidence regarding same at every capital sentencing in states prohibiting release on parole on a life sentence, nor has this Court ever made a parole ineligibility instruction mandatory in capital cases. Notwithstanding, Appellant contends that *Kelly, supra,* which was decided after Appellant's trial and sentencing, affords him a basis for relief because that case purportedly "acknowledged that a capital defendant's future dangerousness always will be a foremost consideration for jurors." Appellant's Brief at 75.

However, in this case, Appellant has failed to point to any evidence that specifically indicates his future dangerousness, and, quite significantly, Appellant failed to request either a *Simmons* instruction or a jury instruction pursuant to the Eighth Amendment. Thus, no relief is due. *See Carson, supra* at 272-74 (rejecting the appellant's similar Eighth Amendment argument where the prosecution had not raised the issue of future dangerousness).

XI. Victim Impact Evidence

Appellant argues that because the victim impact evidence presented at the penalty phase was "unduly prejudicial," his due process rights under the

Fourteenth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution were violated. Appellant acknowledges that in *Payne v. Tennessee,* 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the United States Supreme Court held that victim impact evidence introduced in a capital sentencing hearing did not violate the Eighth Amendment of the United States Constitution. In fact, Appellant notes that *Payne* expressly recognized that evidence showing "a quick glimpse of the life [the defendant] chose to extinguish," was not a *per se* violation of the Eighth Amendment. *Payne, supra* at 825, 830, 111 S. Ct. 2597 (O'Connor, J. concurring, quoting *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988)). However, Appellant notes that the separate opinions of the Justices in *Payne* recognized a limit on the use of victim impact evidence. Specifically, where victim impact evidence is unduly inflammatory, several Justices noted that inclusion of such evidence might entitle a defendant to relief under the Due Process Clause of the Fourteenth Amendment. *See id.* at 831 (O'Connor, J. concurring).

Here, Appellant argues that the evidence adduced from fourteen victims of Appellant's crimes at the sentencing phase of trial crossed the threshold from being "a quick glimpse of the life [the defendant] chose to extinguish" to being unduly inflammatory and prejudicial. Appellant highlights the following evidence: (1) Bang Gho, Thao Pak Pham's wife, describing how their six-year-old son kept asking

when his father would return home and how she and her son arrived at the crime scene before her husband's body had been removed; (2) two of Anita Gordon's daughters describing the devastating impact Mrs. Gordon's death had had on their father and grandmother, and how the latter had to be moved to a nursing home because Mrs. Gordon was no longer available to care for her; (3) a friend of the Gordons describing the intense pain the family suffered; (4) individuals familiar with Anil Thakur describing the financial effect that the victim's death had on his parents in India, who no longer receive the financial assistance the victim had provided; (5) Ji-Ye Sun's 70-year-old father describing how his wife had cried so much that she required surgery to save her sight, and his own feelings of having "lost everything;" and (6) Mr. Sun's wife, Jun Sun, describing how, after her husband's death, she was unable to eat, drink, or sleep but experienced pain and a sense that her "brain is empty." Appellant's Brief at 77-78. Appellant avers that the prejudicial impact of this evidence on the jury outweighed its probative value.

There are myriad problems with Appellant's argument. The first and most significant is that Appellant never made timely and specific objections to the evidence. Appellant had filed a pre-penalty phase motion *in limine* to exclude **all** victim impact evidence on the grounds that, because such evidence did not pertain to any statutory aggravating circumstance, the admission of the evidence was unconstitutional. The court denied the motion, noting that the

United States Supreme Court had ruled that such evidence was permissible, citing *Payne*. However, the court indicated that Appellant could request from the Commonwealth an offer of proof as to each witness and could lodge an objection particular to that witness if appropriate. Appellant never objected to any of the Commonwealth's fourteen victim impact witnesses.[25] Because Appellant failed to object to the evidence on the grounds that he now raises, his issue is waived. Pa.R.A.P. 302(a).

However, it must also be emphasized that "Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding," including victim impact evidence. *Commonwealth v. Eichinger,* 591 Pa. 1, 915 A.2d 1122, 1139 (Pa. 2007), *cert. denied,* 128 S. Ct. 211, 169 L. Ed. 2d 158 (2007). Indeed, victim impact evidence is statutorily admissible in the penalty phase of capital cases pursuant to Section 9711(a)(2) of the Sentencing Code, 42 Pa.C.S. § 9711(a)(2). "Victim impact testimony is permissible when the Commonwealth establishes that the victim's death had an impact on the victim's family as opposed to presenting mere generalizations of the effect of the death on the community at large. Once this threshold has been met, the trial court has discretion over the testimony admitted." *Eichinger, supra* at 1139-40; *see*

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[25] Notably, Appellant did object to the introduction of a photograph during the testimony of Jun Sun. The court sustained the objection.

also Commonwealth v. Williams, 578 Pa. 504, 854 A.2d 440, 446 (Pa. 2004). Testimony that is "a personal account" describing the "devastating impact the murders had on" the surviving families is wholly appropriate and admissible at the sentencing phase of a capital case. *Eichinger, supra* at 1140.

Here, the specific evidence that Appellant challenges is in the same mold as that determined to be appropriate in *Eichinger* and *Williams*. The evidence challenged by Appellant consists of personal accounts describing the devastating impact the murders had on the surviving family members. Moreover, the number of witnesses called to testify was not disproportionate to the number of Appellant's victims. Thus, there is patently no basis for the conclusion that the trial court abused its discretion by admitting such evidence, even if Appellant had not waived the issue.

XII. Victim Impact Evidence as Causing the Death Sentence to be based on Caprice and Vague Factors

In this argument, Appellant concedes that the trial court **correctly** charged the jury in accordance with this Court's case law regarding victim impact evidence. However, Appellant "argues" that the admission and consideration of victim impact evidence interjects an unconstitutionally vague and capricious factor into a jury deliberation process that must determine whether statutory aggravating factors outweigh mitigating factors. Appellant concedes

that there is no Pennsylvania authority supporting his argument;[26] however, he raises this claim for the purpose of "preserv[ing] it for federal review." Appellant's Brief at 80.

Appellant did not object to the jury charge relating to this issue. Accordingly, Appellant's issue is waived. Pa.R.A.P. 302(a). Moreover, Appellant does not even appear to be asking this Court for relief with respect to this issue. *See* Appellant's Brief at 79-81. Certainly, none is warranted.

XIII. Dr. Welner's "Damning Hearsay"

Appellant argues that his rights under the Sixth Amendment Confrontation Clause were violated when the Commonwealth's psychiatric expert witness, Dr. Welner, testified regarding statements made to him by individuals who did not testify at trial. These individuals included a psychologist who had briefly treated Appellant in 1994; high school and law school classmates; Appellant's sister; Appellant's ex-girlfriend; and Appellant's accountant. *See* Appellant's Reply Brief at 15-17 (listing these individuals as those at issue). Dr. Welner purportedly used the information provided by these individuals in arriving at his conclusion that although Appellant suffered from several psychiatric disorders, Appellant's crimes were not caused by a psychotic illness.

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[26] However, Appellant does cite to dissenting opinions in *Commonwealth v. Means*, 565 Pa. 309, 773 A.2d 143 (Pa. 2001).

In support of his argument, Appellant cites *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which held that the Confrontation Clause of the Sixth Amendment prohibits the use of **testimonial** hearsay obtained by police officers against a criminal defendant, even if such hearsay is reliable, unless the defendant has the opportunity to cross-examine the out-of-court declarant. In so doing, the Court announced a new interpretation of the Confrontation Clause, overruling its earlier holding in *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). *Crawford, supra* at 54. Appellant acknowledges that he had failed to object to Dr. Welner's use of information obtained from these individuals. However, he argues that because *Crawford* was decided after his trial and sentencing, which trial occurred when the relaxed waiver rule of *Freeman* was still in effect, he should not now be penalized for failing to anticipate *Crawford's* changing the law.

Appellant's contention that he should not be penalized for failing to have preserved his objections to the challenged evidence is baseless. "It is settled that, in order for a new rule of law to apply retroactively to a case pending on direct appeal, the issue had to be preserved at all stages of adjudication up to and including the direct appeal." *Commonwealth v. Jones,* 571 Pa. 112, 811 A.2d 994, 1005 (Pa. 2002) (quoting *Commonwealth v. Tilley,* 566 Pa. 312,

780 A.2d 649, 652 (Pa. 2001) (quotation marks omitted)).[27] Here, Appellant failed to timely object to the now-challenged evidence. Moreover, although *Crawford* signaled a change in the law, Appellant fails to indicate how this change was material to his failure to have preserved the issue for review. In *Crawford,* the Court overruled its previous position that testimonial hearsay did not violate the Confrontation Clause if such evidence bore an "adequate indicia of reliability" by either falling within a "firmly rooted hearsay exception" or having "particularized guarantees of trustworthiness." *Crawford, supra* at 40 (quoting *Roberts, supra* at 66). *Crawford* holds that now testimonial hearsay obtained by police is inadmissible unless the defendant had the opportunity to cross-examine the out-of-court declarant. *Id.* at 51-53.

Here, Appellant did not challenge, as he could have, the purported hearsay statements made during Dr. Welner's testimony on the grounds that they did not bear adequate indicia of reliability by either falling within firmly rooted hearsay exceptions or having particularized guarantees of trustworthiness, or on any other grounds. If Appellant was troubled by the purported hearsay testimony given by Dr. Welner,

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[27] Indeed, the Superior Court has applied this basic legal principle to specifically hold that in order for *Crawford* to be applied retroactively, the appellant would have had to preserve his or her objections to the challenged evidence. *Commonwealth v. Gray,* 2005 PA Super 22, 867 A.2d 560, 574 (Pa.Super. 2005).

he did not need support from the specific legal principles later announced in *Crawford* to pursue his objections. Thus, there is no question that Appellant has waived this issue.[28]

XIV. Lethal Injection as Cruel and Unusual Punishment

Appellant argues that the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution prohibit lethal injection because this penalty constitutes cruel and unusual punishment. Appellant contends that there is "mounting evidence" that prisoners experience "excruciating pain" during execution by lethal injection, particularly since it is believed that potassium chloride, one of the three drugs used, causes a burning sensation as it courses through the body. Appellant's Brief at 83. Appellant argues that until Pennsylvania investigates whether its three-drug execution protocol is humane, the procedure should be declared a cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution.

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[28] We would also note that the purported hearsay of Dr. Welner's testimony is not "testimonial" hearsay as contemplated by the Court in *Crawford*. Thus, *Crawford* is inapplicable in any event.

However, the only issues before us are whether Appellant's conviction is valid and whether his death sentences were properly imposed. Our inquiry does not extend to the statutory manner by which the death sentence will be imposed, if it is imposed at all. Until a death warrant has been issued for Appellant, we need not determine the issue of whether the **then**-form of execution, whatever it might be, comports with the Eighth Amendment of the United States Constitution and Article I, § 13 of the Pennsylvania Constitution.

In *Commonwealth v. Terry,* 513 Pa. 381, 521 A.2d 398 (Pa. 1987), this Court was confronted with a claim that the defendant's death sentence should be vacated because there was then no existing statutory authority for the death penalty. We dismissed the claim, holding: "Only the sentence of death is before us. Since no death warrant has been issued, the question of the method of execution is not properly before us. We will consider this issue if and when it is properly before us." *Id.* at 412. Similarly, because the issue of the means of execution is not properly before us, we will dismiss Appellant's argument without prejudice to his right to raise it at a more appropriate time.[29]

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[29] We note that the United States Supreme Court has recently ruled that Kentucky's three-drug protocol of lethal injection, one of the drugs being potassium chloride, is not cruel and unusual punishment under the Eighth Amendment. *Baze v. Rees,* 128 S. Ct. 1520, 170 L. Ed. 2d 420 (U.S. 2008).

XV. Imposition of the Death Penalty on a Mentally Ill Person

Appellant argues that the Eighth Amendment prohibits the imposition of the death penalty on a mentally ill person.[30] Appellant cites *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), for the proposition that the imposition of a death sentence on mentally retarded individuals violates evolving standards of decency embodied in the Eighth Amendment's Cruel and Unusual Punishment Clause. Appellant argues that *Atkins* should be extended to individuals such as himself, who had been described at trial by all psychiatric expert witnesses as suffering from mental illnesses.

However, as Appellant acknowledges, this Court has rejected a substantially similar argument in *Commonwealth v. Faulkner,* 528 Pa. 57, 595 A.2d 28, 38 (Pa. 1991). In *Faulkner,* we stated:

> Appellant's last argument on this subject is that the death penalty statute violates the Eighth Amendment to the United States Constitution by permitting the jury to impose the death penalty when they have found, as a mitigating circumstance, that the

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[30] Appellant's very brief argument does not specifically state whether he is arguing that a person who has committed first-degree murder while mentally ill should not be executed or whether a person who is mentally ill at the time of execution should not be executed. We infer from Appellant's discussion of relevant case law that he is arguing the former.

defendant was mentally ill. Appellant argues that an automatic life sentence should be imposed – and not the death penalty – when the jury finds mental illness as a mitigating circumstance. In *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986), this Court stated that a finding of substantial mental impairment under 42 Pa.C.S. § 9711(e)(3) does not bar a death penalty imposed by the jury:

> Our legislature could have provided that a finding of substantial impairment precludes imposition of the death sentence[;] however, it did not do so. Instead, it determined that this factor was to be weighed by the jury along with all the other factors and that it is within the province of the jury to determine how much weight it should be accorded.

Fahy, 512 Pa. at 317, 516 A.2d at 698-99. We believe this rationale is equally applicable when the jury finds as a mitigating factor that a defendant suffered from "a degree of mental illness."

Id. at 38.

Appellant has failed to advance a compelling argument that would lead us to alter our holdings in *Faulkner* and *Fahy.* Appellant mentions that evolving standards of decency should prompt a reassessment of these decisions. However, Appellant does not

engage in any analysis as to why this should be the case. Accordingly, we conclude that Appellant's argument is without merit.

XVI. Vienna Convention

Appellant contends that his rights under the Vienna Convention on Consular Relations (the "Convention"), 21 U.S.T. 77, T.I.A.S. No. 6820, were violated. Appellant, an American citizen raised and educated in the United States, apparently holds dual citizenship with Latvia, a signatory, as is the United States, to the Convention. The preamble to the Convention provides that its purpose is to "contribute to the development of friendly relations among nations." 21 U.S.T. at 79; *see also Medellin v. Texas,* 128 S. Ct. 1346, 1353, 170 L. Ed. 2d 190 (U.S. 2008). In pursuit of that end, Article 36 of the Convention was drafted to "facilitat[e] the exercise of consular functions." Art. 36(1), 21 U.S.T. at 100. This article provides that if a person detained by a **foreign** country "'**so requests**, the competent authorities of the **receiving** State shall, without delay, inform the consular post of the **sending** State' of such detention, and 'inform the [detainee] of his righ[t]' **to request assistance from the consul of his own state**." *Medellin, supra* at 1353 (quoting Art. 36(1)(b)) (emphasis added). Appellant complains that he was not informed of his "rights" under Article 36(1)(b). Appellant's Brief at 86.

The absurdities of Appellant's argument are manifold. Appellant was not detained by a foreign country but by authorities in his own country and state. Appellant was not "sent" by Latvia to be "received" by the United States; he is not a foreign national. Not only is Appellant a United States citizen, he was also trained as a lawyer in the United States. He was represented by counsel at all stages who spoke the same language as Appellant, came from the same American culture as Appellant, and engaged in legal procedures undoubtedly familiar to Appellant from his legal training. Perhaps Appellant believes that he would have had a better trial result had he been represented at trial by a Latvian attorney or afforded advice by the Latvian Consulate. If so, he has not indicated how his defense was prejudiced by this omission. Moreover, Appellant never requested that the Latvian Consulate be notified.[31]

Appellant argues that the decisions of the International Court of Justice ("ICJ") prohibit the execution of a **foreign national** where the provisions of the Convention have not been followed, specifically citing the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States*), 2004 I.C.J. 12

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[31] It does not appear that Appellant is represented by Latvian counsel on appeal, and Appellant made no averment that he ever consulted with the Latvian consulate to better understand his post-trial rights, despite his knowledge of the Convention.

(March 31, 2004) ("*Avena*"). Aside from the fact that Appellant is not a foreign national, the United States Supreme Court recently ruled that ICJ judgments, and specifically *Avena,* are not binding on our domestic law because none of the relevant treaty sources establishes binding domestic law in the absence of implementing legislation, and no such legislation has been enacted. *Medellin, supra* at 1360-65. In other words, the Convention is not "self-executing." *See id.* at 1365-66.

In short, there is absolutely no merit to this argument.

XVII. Ineffective Assistance of Counsel

Appellant's last argument details alleged instances where he was given ineffective assistance of trial counsel.[32] "Claims of trial counsel ineffectiveness are generally deferred to post-conviction review so that they might be properly developed on a full and complete evidentiary record." *Cousar, supra* at 1043 (citing *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726, 736-37 (Pa. 2002)). Appellant makes no legal

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[32] Specifically, Appellant alleges that trial counsel was ineffective for having failed to (1) request a change of venue or venire; (2) object to the removal of prospective jurors Mock and Hawthorne; (3) move to suppress the evidence obtained pursuant to the April 28, 2000 search of Appellant's house; and (4) object to and seek a hearing regarding his "forced drugging" and request a jury instruction regarding the reasons for his "apparent stupor" during trial. *See* Appellant's Brief at 86-92.

argument as to why his ineffectiveness claims should not be deferred until post-conviction review.[33] Accordingly, we conclude that Appellant's ineffectiveness claims must be deferred to post-conviction proceedings, as contemplated by the rule set forth in *Grant*, if Appellant chooses to pursue them.

XVIII. Statutory Review

Having concluded that Appellant's convictions were proper and that none of his claims of error entitles him to relief, we must affirm each death sentence unless we find that: (i) the sentence was the product of passion, prejudice, or any other arbitrary factor; or (ii) the evidence fails to support the finding of at least one aggravating circumstance. *See* 42 Pa.C.S. § 9711(h)(3); *Cousar, supra* at 1044. Upon careful review of the record, we are persuaded that Appellant's death sentences were not the product of passion, prejudice, or any other arbitrary factor, but rather resulted from properly introduced evidence that Appellant intentionally and deliberately shot to death Anita Gordon, Anil Thakur, Ji-Ye Sun, Thao

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[33] Indicating that a petition for post-conviction review will likely be filed, Appellant contends that we will have to review these ineffectiveness issues anyway, so we may as well review them now. Aside from our general disinclination to act based on prognostications of the future, we see no reason to circumvent the rule in *Grant*, as it was cogently based on the premise that a review of ineffectiveness claims is generally best made upon a full factual record developed by a post-conviction court.

Pak Pham, and Garry Lee. We also conclude that the evidence was sufficient to support the two aggravating factors found by the jury in relation to the killings. There is no doubt that "[i]n the commission of the offense [Appellant] knowingly created a grave risk of death to another person in addition to the victim of the offense." 42 Pa.C.S. § 9711(d)(7). When Appellant shot Ji-Ye Sun and Thao Pak Pham, he created a grave risk of death to David Tucker, who was present in the restaurant when Appellant opened fire multiple times on his victims. In fact, Pham was shot just two to three feet away from Tucker as he was running past Tucker, who was trying to "dodge" the danger that was unfolding before him. N.T. Trial, 4/30/01, at 433-35. When Appellant shot Garry Lee, he created a grave risk of death to George Lester Thomas II, who was present in the karate studio when Lee was shot quite near to him, and in fact, Appellant had first pointed his weapon at Thomas. Further, there is no doubt that "[t]he defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the same time of the offense at issue." 42 Pa.C.S. § 9711(d)(11). Here, Appellant was convicted of five murders, all of which were committed during the two-hour homicidal rampage that occurred on April 28, 2000.

For the foregoing reasons, we affirm the verdicts and sentences of death. The Prothonotary of this Court is directed to transmit the complete record of this case to the Governor of Pennsylvania in

accordance with Section 9711(i) of the Sentencing Code, 42 Pa.C.S. § 9711(i).

Mr. Chief Justice Castille and Messrs. Justice Eakin and Baer join the Opinion.

Mr. Justice Saylor files a Concurring Opinion.

Madame Justice Todd files a Concurring Opinion.

CONCUR BY: SAYLOR; TODD

CONCUR

MR. JUSTICE SAYLOR

I join Parts I through V and XIII through XVIII of the majority opinion, concur in the result with regard to Parts VI through XII, and write to the following.

As to Issue VI, concerning the interception of Appellant's telephone conversations in the asserted absence of written notice, Appellant presents a plain-meaning interpretation of a statute which plainly requires written notice.[1] Further, Appellant relies on

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[1] The trial court construed the statute to require one-time written notice to existing inmates only upon implementation of the overall practice of recording calls. *See Commonwealth v. Baumhammers*, Nos. 200014712 *et al.*, slip op. at 14 (C.P. Allegheny Dec. 29, 2005) ("The Court does not read this paragraph as requiring that written notice be provided to every inmate upon their admission to the facility."). Neither the Commonwealth

(Continued on following page)

decisions of this Court establishing that exceptions to the prohibition against wiretapping must be strictly construed, *see Boettger v. Miklich*, 534 Pa. 581, 585-86, 633 A.2d 1146, 1148 (1993), as well as this Court's admonition that: "No violations of *any* provisions of the Act will be countenanced[.]" *Commonwealth v. Hashem*, 526 Pa. 199, 206, 584 A.2d 1378, 1382 (1991) (emphasis in original). In light the clear terms of the statute, *Boettger*, and *Hashem*, I cannot support the majority's characterization of Appellant's argument as being wholly without merit, based on the mere assessment that provision of the written notice required by the Legislature would not have advanced the privacy interests involved. *See* Majority Opinion, slip op. at 22. Rather, it seems to me that the majority's approach represents a departure from the requirement of strict construction and/or a form of prejudice assessment, as was previously prohibited. *See Hashem*, 526 Pa. at 205, 584 A.2d at 1381 ("We must likewise specifically reject the Superior Court's holding that before relief can be granted in this type of claim the Defendant must bear the burden of

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nor the majority, however, advocates such a construction. Furthermore, although the statute does appear to be ambiguous in the relevant regard, applying the Court's practice of strictly construing in favor of the privacy interests which are intended to be safeguarded, as referenced below, I agree with the conclusion that the relevant statutory notice is to be provided to each inmate.

showing how the failure to comply with the Act prejudiced him.").[2]

Nevertheless, I believe the Commonwealth appropriately relies on the principles governing review of suppression-court rulings, which center the appellate court review on the record of the suppression hearing. *See, e.g., Commonwealth v. Eichinger,* 591 Pa. 1, 22, 915 A.2d 1122, 1134 (2007). Here, even if inmates were not in fact informed via the institution handbook of the practice of recording calls, the evidence presented to the suppression court indicated otherwise. *See* N.T. at 571-573 (reflecting the testimony of a jail official to the effect that inmates were "[f]irst of all, and most foremost" notified through a posted inmate handbook of the practice of recording

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[2] While the majority correctly observes that the provision of the Act under review in *Hashem* appeared in a separate section of the statute, the *Hashem* Court repeatedly indicated that its approach applied more broadly to the Wiretap Act as a whole, and the majority does not explain how the application of a strict-enforcement approach to one portion of the statute is to be reconciled with its more pragmatic approach to another.

The Commonwealth predicates its argument that a plain-meaning application of the legislative mandate for written notice would be absurd upon an example involving the uselessness of providing written notice to blind or illiterate inmates. *See* Brief for Appellee at 42. This does not seem to me to furnish a reason for the judiciary to retool the statute, however, as such inmates may (and should) obtain assistance from prison officials or others in reading written materials made available to them. Moreover, it seems axiomatic that exceptional circumstances should not be taken to eviscerate clearly stated rules of general application in non-exceptional circumstances.

telephone calls). The two items of contrary evidence upon which Appellant now relies (the handbook itself and an affidavit of a jail employee) were not brought onto the record of the suppression hearing, but apparently were obtained by Appellant's counsel after sentencing. As the Commonwealth explains, however, such items are not appropriately considered in this Court's direct review of the suppression court's ruling, as they were not before the court at that time. Accordingly, although Appellant may have claims of deficient stewardship to assert during post-conviction proceedings, I do not believe that his argument in this direct appeal is cognizable on the terms on which it is presented.[3]

With regard to Issue VII, I agree with the majority that the contested testimony did not violate attorney-client or work-product privileges. *See* Majority Opinion, slip op. at 26. Nevertheless, I also agree

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[3] In his reply brief, Appellant attempts to recast his argument, in the alternative, as a due process challenge. *See* Reply Brief of Appellant at 12 ("Since the Commonwealth as a prosecuting entity knew that [the jail official's] testimony was false, and there is a reasonable likelihood that had the prosecution revealed the truth about the handbook, the tapes would have been suppressed, Due Process requires a new trial."). However, arguments first raised before an appellate court in a reply brief are not properly considered. *See Commonwealth v. Wharton,* 571 Pa. 85, 105, 811 A.2d 978, 990 (2002). The present circumstances demonstrate good reason for this practice, since Appellant's argument addresses the extent of the prosecutor's knowledge, an inherently factual matter which has not been developed upon an evidentiary record at this juncture.

with Appellant that there was a significant possibility that the evidence of Dr. Merikangas' failure to consult with Dr. Wettstein could have had a prejudicial impact outside the limited purpose for which it was admitted, namely, to test the scope of Dr. Merikangas' review. *See* N.T. at 1496. In this regard, however, I find it significant that Appellant did not request a limiting instruction to mitigate the possibility of prejudice. *Cf. Commonwealth v. Moore,* 594 Pa. 619, 639-40, 937 A.2d 1062, 1074 (2007) (explaining that potential prejudice may be mitigated by a limiting instruction and deferring any analysis of a trial counsel's performance in failing to request such an instruction to post-conviction review).

As to issue IX, the asserted denial of the right to present mitigating evidence in the form of testimony from Dr. Martone, the majority indicates that Appellant failed to set forth the substance of the testimony he hoped to elicit from Dr. Martone or how such testimony would have been different from that given by Dr. Martone during the guilt phase of trial. *See* Majority Opinion, slip op. at 32 n.16. Appellant, however, does explain:

> the defense proffered that Dr. Martone would have testified that [Appellant] was under the influence of extreme mental and emotional disturbance at the time she saw him in May 2000 and at the time of the commission of the offense. Further, she would have testified that [Appellant's] capacity to appreciate the criminality of his

> conduct or to conform his conduct to the requirements of the law was substantially impaired.

Brief for Appellant at 56-57. In light of the general proffer going specifically to two statutory mitigating factors, I view this issue as a closer one than the majority, particularly in light of the constitutional norms requiring liberal admission of mitigating evidence. *See, e.g., Tennard v. Dretke,* 542 U.S. 274, 285, 124 S. Ct. 2562, 2570, 159 L. Ed. 2d 384 (2004). I agree with the majority, however, that if Dr. Martone's testimony was to be cumulative of that of other defense experts, in the sense that it would not materially add to the weight of the evidence favoring the finding of one or more mitigating circumstances, the trial court's decision to exclude the testimony should be sustained. At least in the absence of a developed record concerning the specifics of what Dr. Martone's testimony would have been, and a fact finder's assessment regarding the degree of potential impact, there appears to me to be insufficient basis to question the trial court's judgment as to cumulativeness. Notably, in this regard, Appellant did not raise this claim in his post-sentence motions or request a hearing on the matter to develop a factual record.

As to the claim challenging the admission of victim impact evidence (Issue XI), the prosecutor's indication that one facet of the evidence "cannot be written with such detail and emotion as it unfolded in this case" encapsulates the difficulty with this type of evidence and highlights the need for careful control

by the trial courts.[4] N.T. at 3080. Given the number of witnesses presented and the passionate character of many of the statements, I find this to be a close case in terms of whether the trial court exceeded its discretion in this regard. I also recognize, however, that the Constitution does not foreclose evidence of the harm caused by the defendant in capital sentencing proceedings, *see Payne v. Tennessee,* 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991), and Appellant caused an immeasurable amount of harm. Thus, although I agree with the majority that no relief is due here, given that we are seeing fairly wide differences across cases in terms of the degree of control exercised by the trial courts over the development of victim impact evidence, I believe that the Court would be well advised to consider exercising its rulemaking function to impose some structural limitations.

CONCURRING OPINION

MADAME JUSTICE TODD

I join in the thorough and thoughtful majority opinion except for the issues raised herein, as I agree with the majority's conclusion that Appellant Richard Baumhammers is entitled to no relief, as to either his

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[4] It is well established that the application of the death penalty is to be based on reasoned moral judgment, *see Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S. Ct. 2934, 2947, 106 L. Ed. 2d 256 (1989), as opposed to passion or emotion.

conviction or his sentence of death. I write separately because my reasoning differs from the majority's as to several of the issues Baumhammers raises.

First, as to Baumhammers' argument that the Commonwealth violated the Wiretap Act in recording his telephone conversations with his parents while he was incarcerated awaiting trial, I agree with the result reached by Justice McCaffery, but on narrower grounds. *See* Majority Op. at 18-23. I would explicitly adopt the parsing of the relevant statute by the trial judge, the Honorable Jeffery A. Manning: that a written notification to inmates is necessary only upon *a facility's implementation* of a policy of wiretapping inmate phone calls. Trial Ct. Op., 12/29/05, at 14; *see* 18 Pa.C.S.A. § 5704(14)(i)(A). Accordingly, I conclude Baumhammers was not entitled to written notification, and the aural notification he was provided was adequate to satisfy the statutory requirements. *See Chimenti v. Pa. Dep't of Corrections,* 720 A.2d 205 (Pa. Cmwlth. 1998) (concluding in *dicta* Section 5704 requires written notice when that section is implemented).

Next, on several of the issues Baumhammers raises, I would begin and end with waiver. First, Baumhammers asserts the trial court erred in not granting him a change of venue or venire; his trial counsel, however, specifically opposed either suggestion when raised by the trial court. *See* Majority Op. at 12-16. Accordingly, this argument is waived for purposes of direct appeal. Second, Baumhammers asserts the trial court erred in not excluding particular

victim impact evidence, *see* Majority Op. at 45-47; however, his trial counsel did not specifically object to the introduction of testimony from any of the particular victims. Accordingly, this argument is also waived for purposes of direct appeal. Third, Baumhammers asserts that his rights under the Confrontation Clause, in light of *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), were violated when Dr. Michael Welner testified about conversations regarding Baumhammers which Dr. Welner had with a variety of non-testifying individuals. *See* Majority Op. at 48-50. Again, Baumhammers' trial counsel did not object at trial, and so this argument is waived for purposes of direct appeal. Nevertheless, in each of these instances, the majority continues on to address the merits of the waived claims. Consistent with *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726, 736-37 (Pa. 2002), any discussion of the underlying legal support – or lack thereof – for these arguments beyond a finding of waiver is *dicta,* and is better conducted, if necessary, on collateral appeal. With limited exception, under *Grant,* we foreclose a prisoner on direct appeal from recasting waived claims in terms of counsel's ineffectiveness, requiring such appellant to defer such claims until collateral appeal, no matter how potentially meritorious. As a corollary, we ought similarly to resist discussion of the merits of such claims on direct appeal, as our discussion could prejudice the collateral appeal courts' proper consideration of the relevant issues.

Finally, I address Baumhammers' claim that his execution is barred by the Eighth Amendment's preclusion of cruel and unusual punishment because he is afflicted with a serious mental illness. I agree with Justice McCaffery that Baumhammers' claim fails, *see* Majority Op. at 51-53, but write separately to express my grave concern about the issue.[1]

Initially, it is clear Baumhammers merits no sympathy. As the majority summarizes in detail, Majority Op. at 2-9, he committed vicious hate crimes, targeting people of African-American, Asian, and Jewish descent. He defaced synagogues, targeted businesses and places of worship catering to members of particular ethnic groups, killed five people, and paralyzed one. Our streets are safer because he is no longer on them.

However, distinct from the question of whether Baumhammers is dangerous or evil is the question of whether he may, consistent with the Eighth Amendment, be subjected to capital punishment. Baumhammers argues he may not be executed based on *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), wherein the United States

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[1] I recognize we lack detailed advocacy on the issue, as Baumhammers argues only that "the *Atkins* decision should and will be extended to individuals, like him, who are mentally ill." Brief for Appellant at 85. Moreover, I note Baumhammers raises no claims under Article I, Section 13 of the Pennsylvania Constitution. However, I am convinced this recurring issue deserves further consideration by legislators and jurists.

Supreme Court held that prisoners who, at the time they committed their crimes, suffered from mental retardation could not be executed for those crimes. He avers that individuals with serious mental illnesses are so similar to the mentally retarded that *Atkins* requires a similar *per se* ban on their execution. He argues it is constitutionally inadequate merely to permit the mentally ill to argue their mental illness constitutes a mitigating factor at sentencing, as is presently allowed.[2]

The evidence that Baumhammers suffers from a serious mental illness is ample. Uncontroverted evidence indicates he was institutionalized in 1993 and 1999 for severe mental illness; was unable to hold a steady job because of his mental illness; hallucinated at his admission to the Georgia state bar that individuals were harassing him and calling him names; believed the FBI, CIA, and Mossad were trying to kill him; and refused to take out the garbage, asserting that when he did so people shot at him with lasers. He unsuccessfully attempted treatment with an alphabet of psychotropic medications, including Anafranil, Ativan, Cogentin, Haldol, Inderal, Luvox, Norphronin, Paxil, Prozac, Risperdol, Seroquel, Trilafon, Zoloft, and Zyprexa. Shortly after the crime, Baumhammers was diagnosed by Dr. Christine Martone with paranoid schizophrenia and auditory hallucinations. *See*

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[2] Pennsylvania follows the Model Penal Code in allowing mental illness to be argued in mitigation. 42 Pa.C.S.A. § 9711(e)(2); MPC § 210.6(4)(b).

Majority Op. at 31. Psychiatric witnesses including Dr. Welner, the Commonwealth's expert, testified that Baumhammers suffered from persecutory delusions (Dr. James Merikangas, N.T. 9/4/01, at 1431; Dr. Philip Ninan, *id.* at 1544; Dr. Edward Friedman, *id.* at 1587; Dr. Matcheri Keshavan, N.T. 9/5/01, at 1636; Dr. Welner, N.T. 9/6/01, at 1936); paranoid schizophrenia (Dr. Martone, *id.* at 1791, 1799; Dr. Laszlo Petras, *id.* at 1866); and schizo-affective disorder and depression (Dr. Soroya Radfar, N.T. 9/5/01, at 1739-41). Moreover, the Commonwealth concedes in its brief Baumhammers was delusional. Brief for the Commonwealth at 84. Consequently, sufficient evidence was presented at trial to demonstrate Baumhammers' serious mental illness.

Our legal system struggles with how to fairly allocate criminal liability and criminal punishment to individuals whose mental illness leaves them with diminished capacity for moral decision-making. Some defendants, we recognize, are so impaired in this regard that to assign any criminal liability to them would be inequitable. In those cases, the law requires a verdict of not guilty by reason of insanity. *See* 18 Pa.C.S.A. § 315. Other defendants are less impaired but still impaired enough that the opprobrium of a conviction should be mitigated by a recognition of their condition. In those cases, the law requires a verdict of guilty but mentally ill. *See* 18 Pa.C.S.A.

§ 314.[3] Within this latter category, Baumhammers now suggests a further refinement: certain mental illnesses which are so impairing to every person afflicted with them that such a person cannot be culpable enough to merit capital punishment (though, as in *Atkins* and *Roper,* 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), a life sentence without the possibility of parole would remain constitutionally permissible).

As the Majority notes, there is controlling precedent from our Court on this issue. *Commonwealth v. Faulkner,* 528 Pa. 57, 75-76, 595 A.2d 28, 38 (1991). In *Faulkner,* we held that the Eighth Amendment did not preclude the execution of prisoners who were mentally ill at the time of the crime. However, the great principle of *stare decisis* is less powerful in the Eighth Amendment context, since the "national consensus" the Eighth Amendment requires is by definition temporally situated. *See Atkins,* 536 U.S. at 311 ("A claim that punishment is excessive is not judged by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that *currently* prevail" (italics supplied)); *Trop v. Dulles,* 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (noting that the Eighth Amendment is

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[3] We recently noted the difficult distinctions between defendants who are not guilty by reason of insanity and those who are guilty but mentally ill. *Commonwealth v. Rabold,* 597 Pa. 344, 951 A.2d 329 (2008).

governed by "the evolving standards of decency that mark the progress of a maturing society"). In *Atkins*, the Supreme Court overturned a 13-year-old precedent, *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (holding that the Eighth Amendment does not bar the execution of prisoners who were mentally retarded at the time they committed their offenses). In *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court held the execution of prisoners who were under 18 at the time of their crimes was barred by the Eighth Amendment. In so doing, the Court overturned a 16-year-old precedent, *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989) (holding that the Eighth Amendment does not bar the execution of prisoners who were under 18 years of age at the time they committed their offenses). Both decisions were based on changes in the factors which, taken together, determine the existence of a national consensus. Accordingly, I believe we may re-examine *Faulkner* in light of contemporary standards to effectuate the protections afforded by our national charter.

A group of offenders may be excluded from capital punishment under the Eighth Amendment only if a national consensus barring the execution of such offenders exists. The United States Supreme Court has set out four indicia to consider in determining the existence of such a consensus: (1) legislation enacted by the country's legislatures, including whether there is a pattern of movement towards precluding the execution of members of a particular

group; (2) the decisions of sentencing juries, appellate courts, and governors about whether to execute defendants in that group; (3) where appropriate, other indicia of national and international opinion; and (4) the court's own judgment. *See Roper,* 543 U.S. at 563-65 (2005). In such cases, though capital punishment usually must be "sensible to the uniqueness of the individual," *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982), and "tailored to his personal responsibility and moral guilt," *Enmund v. Florida,* 458 U.S. 782, 801, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982), a national consensus may develop which holds that an immutable characteristic of the defendant so affects his individual responsibility and moral guilt that it precludes finding his "consciousness [is] materially more 'depraved' than that of any person guilty of murder," as is required for capital punishment to be lawful. *See Godfrey v. Georgia,* 446 U.S. 420, 433, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). In such circumstances, our high Court holds that a defendant's execution is barred.

Under the United States Supreme Court's Eighth Amendment jurisprudence, I agree that Baumhammers cannot meet the *Atkins/Roper* test on the basis of the record before us. While there is some disagreement within our high Court, it is reasonably clear that an offender seeking to satisfy the first factor of *Atkins* and *Roper,* which focuses on legislative action, must show, at least, that a majority of jurisdictions bar the execution of members of his group and the "direction of change" is consistent and

in favor of barring the execution of members of his group. *See Atkins,* 536 U.S. at 315. To satisfy the second factor, he must additionally show that juries impose capital punishment on members of his group exceedingly rarely. *See Roper,* 543 U.S. at 563-65; *Thompson v. Oklahoma,* 487 U.S. 815, 833, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality) (concluding that where only five offenders under the age of 16 had been among the 1,400 defendants sentenced to death nationwide between 1982 and 1986, their sentences had been "cruel and unusual in the same way that being struck by lightning is cruel and unusual"). Critically, Baumhammers does not attempt to demonstrate any of these propositions apply to paranoid schizophrenics, and he has not introduced any evidence which would suggest the existence of such a national consensus.

Moreover, Baumhammers conceded at oral argument that the factors laid out in *Atkins* and *Roper* are not present here. In his brief, he provided only a cursory argument that *Atkins* should apply directly to the seriously mentally ill without any evidence demonstrating legislative action against the execution of seriously mentally ill defendants,[4] diminished imposition of the death penalty on seriously mentally

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[4] Research has revealed only one state, Connecticut, which has imposed such a restriction. *See* Conn. Gen.Stat. Ann. § 53a-46a(h).

ill defendants,[5] support from national and international opinion, or guidance for the exercise of this Court's independent judgment.[6] Accordingly, in this case, I join Justice McCaffery's conclusion on the issue.

Nonetheless, I concur with the opinions expressed by Justice Evelyn Lundberg-Stratton of the Ohio Supreme Court, that the similarities between

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[5] To the extent data is available, it may be read to indicate the percentage of mentally ill defendants on death row is increasing, not decreasing. *See* National Mental Health Association, Death Penalty & People with Mental Illnesses (2006), http://www1.nmha.org/position/deathPenalty/deathpenalty.cfm. This data is not conclusive, since NMHA does not explicitly state whether it is studying only offenders who were mentally ill at the time of the crime or including offenders who become mentally ill on death row. It is beyond cavil that a prisoner who is suffering from a severe mental illness that makes him unable to understand the reasons he is being put to death may not be executed. *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (noting that prohibition dates to medieval English common law); *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

[6] Federal courts have consistently declined to extend *Atkins* to the mentally ill. *See, e.g., In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (citing *In re Woods*, 155 F.Appx. 132, 136 (5th Cir. 2005)); *Joshua v. Adams*, 231 F.Appx. 592, 593 (9th Cir. 2007); *Green v. Quarterman*, 2008 U.S. Dist. LEXIS 11459, 2008 WL 442356 (S.D. Tx. 2008). Our neighboring state courts, too, have concluded *Atkins* does not apply to the seriously mentally ill. *State v. Ketterer*, 111 Ohio St. 3d 70, 2006 Ohio 5283, 855 N.E. 2d 48 (Ohio 2006); *Matheney v. State*, 833 N.E. 2d 454 (Ind. 2005) (holding that permitting a defendant to argue mental illness constitutes a mitigating factor at his penalty phase hearing provides adequate protection).

individuals with severe mental illness and those with mental retardation or juvenile status are strong enough to justify serious consideration by the country's legislatures. *See Ketterer,* 111 Ohio St. 3d 70, 2006 Ohio 5283, 855 N.E. 2d 48, 81-87 (Ohio 2006) (Lundberg-Stratton, J., concurring). As Justice Lundberg-Stratton emphasized, as with mentally retarded defendants, it is not clear that either purpose of capital punishment – retribution or deterrence – is served by imposing that punishment on defendants who are severely mentally ill at the time of their crimes. *Id.* at 85; *see also State v. Nelson,* 173 N.J. 417, 803 A.2d 1, 47 (N.J. 2002) (Zazzali, J., concurring); *Corcoran v. State,* 774 N.E. 2d 495, 502 (Ind. 2002) (Rucker, J., dissenting).

In both *Atkins* and *Roper,* the Supreme Court described in some detail the characteristics which rendered members of the group in question constitutionally exempt from capital punishment – the mentally retarded and juveniles, respectively. Justice Stevens noted that mentally retarded offenders:

> [F]requently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct

> than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Atkins, 536 U.S. at 318 (footnotes omitted). Accordingly, Justice Stevens concluded, "the lesser culpability of the mentally retarded offender surely does not merit" a punishment reserved for the most culpable adult offenders. *Id.* at 319.

In *Roper,* Justice Kennedy emphasized three primary differences between adolescents and adults: first, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"; second, the fact that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and finally, the fact that "the character of a juvenile is not as well formed as that of an adult." *Roper,* 543 U.S. at 569-570.

Serious mental illnesses have similar effects. *See* Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness,* 33 N.M. L. Rev. 293 (2003) (arguing the effects of mental retardation and serious mental illness are so similar as to eliminate a rational basis for distinguishing between the two categories of defendants); *see, e.g.,* National Institute of Mental Health, *Schizophrenia,* available at http://www.nimh.nih.gov/health/publications/schizophrenia/

complete-publication.shtml (noting that schizophrenics struggle to absorb and interpret information and make decisions based on that information).

An individual with a serious mental illness may be just as seriously impaired in his ability to "understand and process information" as an individual with a diminished IQ or an individual who has not yet reached the age of legal majority. Moreover, while mental illness is no more an unavoidable cause of criminal conduct than mental retardation or being a juvenile, its manifestations – such as the delusions that accompany paranoid schizophrenia – hamper a sufferer's ability to "engage in logical reasoning," and the disconnect between a paranoid schizophrenic's basic understanding of the world around him and that of an individual not similarly afflicted will make it difficult for the schizophrenic to understand others' reactions. *Compare Atkins, supra* (holding that similar characteristics of the mentally retarded made them categorically ineligible for capital punishment).[7]

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[7] An independent judicial examination of the culpability of individuals with serious mental illnesses, and the constitutional propriety of their execution for crimes as indubitably heinous as Baumhammers', is well within the traditional parameters of the Eighth Amendment. *See Coker v. Georgia*, 433 U.S. 584, 597, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) ("the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment"); *Roper*, 543 U.S. at 565 (interpreting *Coker* to require the Court to independently consider the appropriateness of executing members of a particular group). This

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Moreover, several national organizations have taken positions against the execution of the severely mentally ill. *See Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty,* 54 Cath. U. L. Rev. 1115, § 2 (2005); Public Policy Platform of the National Alliance on Mental Illness, §§ 9.7.1.1, 9.7.1.2 (8th Ed. 2006); Mental Health America, *Position Statement 54: The Death Penalty and People with Mental Illnesses,* available at http://www.nmha.org/go/position-statements/54.[8]

However, despite my grave concerns, I decline to go beyond what *Atkins* and *Roper* require on the record in this case. Accordingly, as did Justice Lundberg-Stratton, I request that our legislature consider the issue, summon and question scientific experts (which

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factor does not subordinate the democratic will to the mere "*feelings* and *intuitions* of a majority of the Justices" on a particular court, *Atkins,* 536 U.S. at 348 (Scalia, J., dissenting) (italics in original), but requires that judges make a reasoned attempt to interpret and apply that Amendment's prohibition on "cruel" punishments. Not to make such an attempt would be to abdicate our proper judicial role. *See id.* at 349 (noting that certain punishments, "such as the rack and the thumbscrew," are always-and-everywhere cruel and so precluded by the Eighth Amendment).

[8] The views of such organizations may evidence a "broader social and professional consensus" that the execution of members of a certain group is unacceptable. *See Atkins,* 536 U.S. at 316 n.21, 122 S.Ct. 2242 (citing the positions of, *inter alia,* the American Psychiatric Association and American Catholic Conference that the execution of the mentally retarded is cruel and unusual).

an appellate court may not do), and consider whether the national consensus and our statutory law are in line with the demands of the Eighth Amendment and of fundamental fairness, considering the best scientific evidence of the impact of severe mental illnesses on individual culpability.[9]

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[9] Naturally, such an analysis will also require consideration of Article I, § 13 of the Pennsylvania Constitution.

APPENDIX B

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY,
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	CRIMINAL DIVISION
v.	CC Nos.: 200014712, 200014713, 200014714
RICHARD S. BAUMHAMMERS, Defendant.	Judge Jeffrey A. Manning

OPINION OF THE COURT

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OPINION OF THE COURT

Before the Court are the Post-Sentence Motions of the Defendant, Richard S. Baumhammers. On April 28, 2000, the Defendant shot and killed five persons, Anil Thakur, Anita Gordon, Garry Lee, Thao

Quoc Pham and Ji-Ye Sun. He also shot Sandip Patel, paralyzing him from the neck down. During the course of his rampage, the Defendant also fired shots into two synagogues and attempted to burn down the Gordon home. He was charged with five counts of criminal homicide; eight counts of ethnic intimidation; three counts of arson; four counts of reckless endangerment; two counts each of criminal mischief and institutional vandalism; and one count each of attempted homicide, aggravated assault, simple assault and carrying a concealed firearm without a license. He proceeded to a jury trial and was found guilty of Murder in the First Degree at each of the homicide counts as well as at all other charges. The trial proceeded to the penalty phase and, on May 11, 2001 the jury returned with a sentencing verdict of death at each of the homicide counts. The Court formally imposed the sentences of death on September 6, 2001. The Court also imposed an aggregate sentence of not less than 112 ½ nor more than 225 years imprisonment on the other counts.

Pending before this Court is the Defendant's original Post-Sentence Motion, Supplemental Motion for Post-Sentence Relief and Second Supplemental Motion for Post-Sentence Relief, filed pursuant to Pa. R.Crim.P. 720. The Second Supplemental Motion was filed in response to the Commonwealth's Reply to the Supplemental Motion in which it argued that the Defendant was permitted, pursuant to *Commonwealth v. Grant,* 813 A2d 726 (Pa. 2002), to raise claims of ineffectiveness and that if the Defendant

did not raise such claims, they could be deemed waived. The Second Supplemental Motion simply raised the claims in the first Supplemental Motion in the context of ineffectiveness claims. This Court will consider the claims raised in the second Supplemental Motion for Post-Sentence Relief, both on their merits and in the context of the ineffectiveness claims.

The Commonwealth established that the Defendant moved methodically from his home in Mt. Lebanon, through neighboring communities, hunting down and shooting persons whose race, religion and/or nationality differed from his. This difference was the only apparent reason for his actions. Seventy-two minutes after his rampage began, five people were dead and one was paralyzed for life. The Defendant killed his next-door neighbor, Anita Gordon, and attempted to burn her house down. Anita Gordon was Jewish and because of that fact alone, the Defendant decided that she had to die. After leaving the Gordon residence, he traveled to the Beth-El Synagogue in Scott Township and defaced it with swastikas and then fired his handgun into the front windows.

The Defendant proceeded next through the western Allegheny County municipalities of Scott and Robinson Townships and Carnegie Borough, stopping at places where he would likely find persons of different races or religions, the obvious targets of his rage. He entered the India Grocers Store in Scott Town Center and shot Anil Thakur and Sandip Patel,

killing Thakur and condemning Patel to life paralyzed from the neck down. He then stopped at the Ahavath Achim Synagogue in Carnegie Borough but, not finding any ready victims, fired into the Temple's glass front and doors. At Robinson Town Center, he found Ji-Ye "Jerry" Sun and Thao "Tony" Pham in the Ya-Fei restaurant. Sun, the assistant manager, and Pham, a delivery person, were killed.

The Defendant's deadly spree ended in Center Township in Beaver County at C.S. Kim's School of Karate where he encountered Garry Lee, an African-American, and Lee's best friend, George Thomas II, a white man. The Defendant shot and killed Lee, leaving Thomas physically unharmed. The Defendant was arrested a short time later in Ambridge Borough.

The Court will address the claims raised in the Defendant's Post-Sentence Motions in the order in which they appear in the Second Supplemental Motion for Post-Sentence Relief.

First, the Defendant contends that trial counsel was ineffective for not requesting a change of venire or venue and that the Court erred in failing to order the change of venue or venire on its own. The issue of whether the Defendant could receive a fair trial in Allegheny County in light of the extensive pre-trial publicity was raised by this Court, *sua sponte*, in pre-trial proceedings. The Court appointed its own investigator to compile evidence of the nature and extent of the pre-trial publicity and conducted an evidentiary hearing. At that hearing, the Defendant,

through counsel, was emphatic that he wanted to be tried by a jury selected from Allegheny County. In response to that assertion the Court conducted an extensive colloquy with the defendant, a lawyer and a member of the bar himself, in which he was fully informed of his right to request a change of venire and that the Court found a change of venire to be warranted under the facts of his case.

The defendant acknowledge that he understood his right to request a change of venire and asserted that he wished to have a jury selected from Allegheny County. The Court found the defendant's decision to be knowing, intelligent and voluntary. The defense expressed confidence that they could select a jury that would fairly try the case and opposed a change of venire or venue. This Court granted that request, somewhat reluctantly, and set forth its reasons for doing so in a lengthy pre-trial opinion that is part of the record in this matter. The reasons for this ruling are set forth therein and need not be revisited. The Court would note, however, that the record of the jury selection process established that it was possible to select a jury untainted by prejudicial pre-trial publicity. Such a jury was, in fact, selected in this matter.

This claim has also been raised in the context of an ineffectiveness claim; that counsel was ineffective for failing to move for a change of venue or venire. In order to sustain a claim of ineffective assistance of counsel, a defendant must establish, by a preponderance of the evidence: (1) that the underlying claim is of arguable merit; (2) that counsel's performance had

no reasonable basis; and (3) that counsel's ineffectiveness worked to his prejudice. *Commonwealth v. LaCava,* 666 A.2d 221, 229 (1995) (citing *Commonwealth v. Edmiston* 634 A.2d 1078, 1092 (1993)). Clearly, based upon this Court's analysis as set forth in the Pre-Trial Findings of Fact, Opinion and Order concerning the issue of a change of venire, the claim that a change of venue or venire might have been appropriate, is of arguable merit. The record, however, also establishes that trial counsel had a reasonable basis for choosing his course of action and that the Defendant was not prejudiced by that choice. Counsel really had two strategic bases for his course of action. The first is that counsel believed that a jury selected from Allegheny County, with its metropolitan character, was more likely to produce jurors who might be willing to accept the defense that was being proffered, that the Defendant was insane and therefore not criminally culpable for these offenses, than would a jury selected from most of the other 66 counties in the Commonwealth, many of which are more rural and conservative than Allegheny County. On its face, this is clearly a reasonable determination based upon the facts alluded to by trial counsel. In addition, trial counsel's decision to forego a change of venue or venire was also reasonable in that it was done with the concurrence of, if not at the insistence of, the Defendant. The Defendant indicated that it was his desire that the matter be tried by a jury selected from Allegheny County and that he agreed with his counsel's recommendation or advice that they not seek a change of venue or venire. It would

not have been proper for this Court to overrule the wishes of defense counsel and of the Defendant and to force upon the Defendant a jury selected from another county.

In *Commonwealth v. Starr,* 664 A2d 1326 (Pa. 1995), the Supreme Court held that this Court erred when it refused to permit a capital defendant's request that he be permitted to represent himself. The Supreme Court concluded that the Defendant had an absolute right to self-representation and reversed the Defendant's conviction and sentence of death. Similarly, this Defendant has an absolute right to be tried by a jury selected from his "vicinage".[1] This Court is satisfied that it no more had the power to overrule this Defendant's constitutional right to be tried by jury of his vicinage, than it had to overrule a defendant's right to self-representation in *Starr*. The

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[1] Article I, Section 9 of the Constitution of the Commonwealth of Pennsylvania provides: In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, ***a speedy public trial by an impartial jury of the vicinage***; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself. (Emphasis added).

Defendant's decision in this matter was clearly made with the consultation of competent counsel, and it would have been error for this Court to overrule the Defendant and his counsel and to force the Defendant to have a jury selected from somewhere other than Allegheny County.

Finally, this Court is also satisfied that the Defendant has failed to establish prejudice from this decision by trial counsel. In *Commonwealth v. Weiss*, 776 A2d 958, 964 (Pa. 2001), *cert. denied*, 535 U.S. 1101 (2002), the Pennsylvania Supreme Court held, "one who claims that he has been denied a fair trial because of pre-trial publicity must show actual prejudice in the empanelling of the jury." Here, as in *Weiss*, there is no evidence that the citizens selected to serve on this jury made their decision on anything other than the evidence produced in the courtroom. In the absence of evidence establishing that the twelve citizens who served and delivered the verdicts in this matter violated their oath as jurors, the Defendant cannot establish prejudice. For all the reasons set forth above, the Defendant's claim that he was denied a fair trial by the failure of this Court to order a change of venue or venire is without merit.

The Defendant next claims that the Court erred in excluding certain prospective jurors and that trial counsel was ineffective in failing to object to their exclusion. Defendant identifies four prospective jurors, Carol Mock, Erica Gevauden, Edward Startari, and Gail Hawthorne, as having been improperly eliminated for cause by the Court, resulting in a jury that

was unconstitutionally more likely to impose a sentence of death. The Court has reviewed the transcript of the jury selection process and is satisfied that the exclusion of these four prospective jurors was proper. The Court must begin with the proposition that, "a Court can exclude, for cause, a juror when the juror's views on capital punishment are such as would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instructions and his or her oath." *Commonwealth v. Bridges,* 757 A2d at 859 (Pa. 2000). In making this determination, it is important for the Court to consider the entirety of the prospective juror's testimony and not snippets taken out of context. Applying the above-referenced test to the testimony of these prospective jurors in their entirety, it is clear that each acknowledged that their ability to be fair and impartial would be affected by the fact that the Commonwealth was seeking the death penalty. Prospective juror Mock stated that she was, "not sure about" her ability to follow the law and return a sentence of death (N.T., Jury Selection, P. 353). Although defense counsel attempted to rehabilitate Ms. Mock, her comment that she, "could follow the Judge's instructions" was qualified by the comment that followed, "I'm not sure that I want to do that. I'm not sure that I want to be put in that position, to have to do that." (N.T., Jury Selection, P. 354). Clearly, when taken as a whole, this prospective juror's testimony revealed that her views on capital punishment would substantially impair her ability to perform her duties

in accordance with the instructions given by the Court.

The other three prospective jurors likewise gave testimony which, in the context of the whole of their testimony, raised substantial questions as to their ability to follow the law. Erica Gevaudan stated that she could only vote for the death penalty if she was, "one hundred percent certain that the person was guilty." (N.T., Jury Selection, p. 623). Even after being advised that the Commonwealth was not required to prove guilt beyond all doubt, she maintained that she would still have a problem imposing the death penalty even if she had concluded that the Defendant was guilty beyond a reasonable doubt. Again, this testimony raised a substantial question as to her ability to follow the law and the instructions of the Court. Her removal was entirely proper.

Similarly, Edward Startari expressed grave reservations about his ability to impose the death penalty because he, "would not want to be responsible for imposing the death penalty and would not want to carry that the rest of his life." (N.T., Jury Selection, p. 687). Finally, Gail Hawthorne stated that as a Christian, she, "believed that the death penalty is not for myself to decide." (N.T. 1053) Although she qualified that by saying that those beliefs would not substantially interfere with the services as a juror, she continued to express reservations over her ability to impose the death penalty even when such a penalty was appropriate under the law. When the prosecutor asked her if she could impose the death

penalty where it was appropriate under the law, she responded, "that's a hard question to answer." (N.T. Jury Selection, p. 1054). She also said that she would impose a higher burden on the Commonwealth with regard to the imposition of the death penalty. (N.T., Jury Selection, p. 1055). This exchange provided sufficient reason for this Court to conclude that this prospective juror would be substantially impaired in her ability to follow the law and impose the death penalty. Accordingly, in that the underlying claims were without merit, the assertion that trial counsel was ineffective for failing to object to the dismissal of these four potential jurors is likewise without merit.

The Defendant next contends that Trial Counsel was ineffective in failing to move to suppress the evidence obtained as the result of the April 28, 2000 search of the Defendant's home and the seizure of his computer and some documents found in his room. This claim was without merit for several reasons. First, the exhibits attached to the Defendant's Motion, offered in support of the claim that there was no consent, actually established that consent to search was obtained prior to the obtaining of a search warrant. The Mt. Lebanon Police Department Investigation Report, attached as Exhibit C to the Defendant's Motion, provides:

> On April 28, 2000, I prepared an Affidavit for a search warrant for the residence of 792 Elm Spring Road in Mt. Lebanon. This was at the request of Center Township P. D. in Beaver County and Allegheny County

> Homicide Detectives. The purpose of the warrant was as ***a backup for a verbal consent*** already received by myself and Ofc. RIDDLE of MLPD from Inese Baumhammers. (Emphasis added).

Inese Baumhammers is the Defendant's mother. This excerpt establishes that a verbal consent was obtained from Inese Baumhammers prior to the securing of the search warrant. The Defendant has not proffered anything else to suggest that this report does not establish that a verbal consent had been obtained ***prior*** to the securing of the search warrant. Since the verbal consent was obtained prior to the officers appearing with the search warrant, the reference to the search warrant could not have affected the granting of the consent.

In addition, the presence or lack of consent was not relevant because the record established that the Affidavit of Probable Cause amply supported the issuance of the search warrant in question. The Affidavit, attached to the Defendant's memorandum of Law as Exhibit B, alleged that on April 28, 2000, the Defendant, Richard S. Baumhammers, was arrested for the shooting death of Garry Lee in Center Township, Beaver County. It further states that information obtained from the vehicle established it belonged to Richard Baumhammers and that his addresses was 792 Elm Spring Road, in the Municipality of Mount Lebanon, Pennsylvania. The Affidavit also established that in the vehicle was a large caliber handgun

with spent cartridges as well as bottles containing a possible accelerant.

It was not unreasonable for the officer to conclude that the Defendant most likely prepared the Molotov cocktails in his residence and that a search of the residence might result in the seizure of the caps from the bottles, trace amounts of gasoline or other items of evidence that would establish that the Defendant prepared those Molotov cocktails. In addition, a search might lead to the discovery of ammunition consistent with the weapon used or other evidence linking the weapon to the Defendant. Finally, the search of the Defendant's room might also have provided evidence explaining why the Defendant traveled some distance from his home and shot an African-American male who was a stranger to him. Documents and other similar items could very well be evidence showing planning for this random crime or motivation for what seemed to be a racially motivated crime. Documents in the Defendant's room or his computer may have revealed where he purchased the weapon used in the murder of Mr. Lee or how he learned to assemble the incendiary devices he possessed at the time of his arrest. The warrant application's identification of the items to be seized was not overbroad. All of the items identified therein could certainly have constituted evidence relevant to the murder of Garry Lee. There was a clear nexus between the crimes the Defendant was suspected of having committed and his only known residence. The Defendant's challenge to the validity of the warrant

and the claim that counsel was ineffective for not seeking to suppress the evidence obtained through search of the Defendant's home are both without merit.

The Defendant next contends that trial counsel was ineffective for failing to properly object to the introduction tape recordings of telephone conversations between the Defendant and his parents while the Defendant was incarcerated in the Allegheny County Jail. Defendant contends that this recording was in violation of the Pennsylvania Wiretap and Electronic Surveillance Control Act, 18 Pa. C.S. § 5701, *et. seq.* Defendant contends that the recordings were obtained in violation of the Wiretap Act because, contrary to testimony offered at the mid-trial suppression hearing when this evidence was proffered, the inmate handbook that was utilized when the Defendant was incarcerated did not contain any provision warning a Defendant that his calls could be recorded or monitored. The Defendant offered an affidavit from Istvan Balogh, a Major at the Allegheny County Jail. Major Balogh stated in the affidavit that the handbook that was posted at the time of the Defendant's incarceration did not contain any written warning concerning the interception or monitoring of inmate telephone calls. This contradicts the testimony offered by the Commonwealth at trial from Major Donis who said that the inmate handbook contained a warning concerning the interception and monitoring of telephone calls and that this handbook was posted in the jail.

The seeming contradiction between the testimony offered at trial and the affidavit of Major Balog is not, however, material to a consideration of this claim. The Defendant does not dispute, and cannot dispute based upon the actual content of the recordings, that he and his parents were on ***actual*** notice that their telephone conversations were being intercepted and monitored. The Defendant conceded that all telephone calls between inmates and persons outside the prison begin with a verbal warning that the calls are monitored and subject to being recorded. The comments by Mr. and Mrs. Baumhammers and by the Defendant during these conversations certainly established that both they and the Defendant knew that their conversations were being monitored and, possibly, recorded. The Defendant contends, however, that the actual notice that was provided to the Defendant and his parents does not satisfy the requirements of the Wiretap Act that there be written notice. The Commonwealth, on the other hand, contends that because the Defendant and his parents had actual notice, the apparent lack of written notice was irrelevant.

The Wiretap Act, 18 Pa. C.S.A. § 5703, *et. seq.* makes the interception of any wire, electronic or oral communication a felony. Also, any illegally intercepted communications are inadmissible in evidence. The only exceptions to this ban are set forth in 18 Pa. C.S. § 5704. There is a specific exception applicable to correctional facilities at § 5704 (14), which provides:

An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge any telephone calls from or to an inmate in a facility under the following conditions:

(i) The county correctional facility *shall* adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any telephone calls from or to an inmate in a county correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their telephone conversations may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording a telephone conversation, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee shall have access to that recording.

(C) The contents of an intercepted and recorded telephone conversation shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

> (ii) So as to safeguard the attorney-client privilege, the county correctional facility shall not intercept, record, monitor or divulge any conversation between an inmate and an attorney.
>
> (iii) Persons who are calling into a facility to speak to an inmate shall be notified that the call may be recorded or monitored.
>
> (iv) The superintendent, warden or a designee of the superintendent or warden or other chief administrative official of the county correctional system shall promulgate guidelines to implement the provisions of this paragraph for county correctional facilities.

The provisions of this paragraph that require written notice, are specifically limited to the time period, "before the implementation of this paragraph." This means, to this Court, that a Correctional Institution that intends to implement the interception permitted by this paragraph must, ***at the time that it implements it***, notify all inmates in the facility at that time that all future conversations will be subject to monitoring. The Court does not read this paragraph as requiring that written notice be provided to every inmate upon their admission to the facility. The oral notice that the Allegheny County Jail provides to inmates and callers at the time the telephone conversations begin is all that is needed to provide the notice required by the Act. Accordingly, this Court finds that it is not a requirement of the Wiretap Act

that all inmates in a correctional facility be provided with written notice of the possibility of the recording of their conversations as long as they receive actual notice during all calls. The contemporaneous oral notice to the parties to a conversation is certainly more likely to make both the inmate and the other party to the conversation aware that their calls are monitored than would a written notice buried in an inmate handbook. Frankly, the written notice would be much less likely to put an inmate on notice of the possibility that their conversation was being recorded. The written notice would also not provide anyone conversing with an inmate any notice whatsoever as to the possibility that their conversation was being recorded. As the intent and purpose of the Wiretap Act is to guard against the surreptitious interception of communications, the oral notice is certainly a better guard against such interception than the written notice. Most importantly, the term "Oral communication" is defined in the act as: "Any oral communications uttered by a person ***possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.*** 18 Pa. C.S. § 5792. (Emphasis added). Certainly, the Defendant had no expectation that the conversation that he was having with his parents, on a telephone line he actually knew was subject to monitoring and recording, was not subject to interception. Both he and his parents were repeatedly advised otherwise by the recording on the phone line and acknowledged during those

conversations that they understood that anything that they said was subject to interception.

In addition, section 5704 of the Wiretap Act also provides, at paragraph (4), that there is no violation where the interception takes place after, " . . . all parties to the communication have given prior consent to such interception." Both the Defendant and his parents, the parties to these conversations, were advised at the outset of every conversation that they were subject to monitoring and recording. Despite receiving this warning, they proceeded with the calls. They did so with full knowledge that it was being intercepted and, perhaps, recorded. The fact that they continued with their communication after being advised that the communication was being intercepted acted as their consent as provided for in § 5704(4).

The next claim, that the Commonwealth presented knowingly false testimony when it presented Major Donis, is also without merit. Nothing that the Defendant has proffered in support of this claim establishes that the testimony was false and, more importantly, if it was false, that the Commonwealth ***knew*** that it was false. Most importantly, the accuracy of Major Donis' testimony was not material to the issue of the admissibility of the recorded conversations. Accordingly, the Defendant suffered no prejudice as a result of that testimony. As set forth above, the intercepted conversations were admissible regardless of whether there was a written warning posted near the telephones, as Major Donis asserted.

This renders any error in admitting Major Donis' testimony harmless.

The final claim related to the inmate handbook, that the Commonwealth violated the prosecution's obligation under *Brady v. Maryland*, 377 U.S. 83 (1963) to permit discovery of exculpatory material, is also without merit given the Court's disposition of the Wiretap Act claim. Whether the warning was in writing and whether the inmate handbook contained a warning, were not factual issues necessary to a disposition of the Defendant's mid-trial challenge to the admissibility of the recorded conversations. The Defendant suffered no prejudice from the failure of the Commonwealth to disclose the existence of the inmate handbook.

The Defendant's next four claims involve the testimony of the Commonwealth's mental health expert witness, Michael Welner, M.D. In the first claim, the Defendant complains that his privilege against self-incrimination was violated during the psychiatric evaluation conducted by Dr. Welner. According to the Defendant, he was misled by Dr. Welner as to the purpose of the interviews and Dr. Welner improperly inquired into areas protected by the attorney client privilege. Both of these assertions are factually and legally without merit.

The Defendant begins his argument on this claim with an absolutely incorrect statement of the law: "Dr. Welner was an agent of the government, and Mr. Baumhammers had a Fifth Amendment privilege not

to speak with him." (Defendant's Supplemental Motion for Post-Sentence Relief, p. 37). When the Defendant filed notice of his intention to present an insanity defense, he waived his Fifth Amendment right against self-incrimination, A defendant who places his mental status at issue may be subjected to compulsory examination by court-appointed psychiatrists, and psychiatric testimony may be introduced by the government at trial to rebut his mental status defense without violating the Fifth Amendment. Accordingly, a defendant can be constitutionally required to submit to a psychiatric examination without being advised of his or her Fifth Amendment privilege against self-incrimination, and the examining psychiatrist's testimony concerning his medical conclusions based upon such examination is admissible at a defendant's trial. *Commonwealth v. Morley*, 658 A.2d 1357, (Pa. Super, 1995).

The case cited by the Defendant for his incorrect statement of the law, *Estelle v. Smith*, 451 U.S. 454 (1981), dealt with a pre-trial examination by a Court appointed expert to assess a defendant's ***competence*** for trial. It did not involve a defendant who asserted at trial that he was insane at the time of the offense and, therefore, not criminally culpable. A defendant may assert his Fifth Amendment privileges in the context of a competence examination and, more importantly, statements made by a defendant during such an examination may not be used against him at trial. By raising an insanity defense, however, a defendant waives these important protections and

must submit to an examination by a Commonwealth expert.[2]

The Defendant waived his privilege against self-incrimination when he notified this Court that he intended to present a defense of insanity. The Defendant has not offered anything to establish that the questions asked by Dr. Welner were not part of Dr. Welner's attempt to evaluate the Defendant's mental status and to rebut that he was insane at the time of the offenses. The Defendant's complaints concerning Dr. Welner's inquiries into the Defendant's apparent racism are absurd. The Defendant contended that he committed these offenses because he was insane. The Commonwealth, however, argued that the Defendant was not insane and that, rather than being motivated by a mental illness, the murders were motivated by the Defendant's racist views. It was certainly appropriate for Dr. Welner to inquire into the Defendant's views regarding race given the obvious targeting of racial minorities. Dr. Welner's inquiry into these

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[2] The Defendant similarly misrepresents the holding *Commonwealth v. Sartin*, 751 A.2d 1140 (Pa. 2000) which did not involve a insanity defense but, rather, involved the Commonwealth's right to an examination of the defendant in anticipation of the defendant presenting psychiatric evidence in support of mitigation in the penalty phase of a capital case. The Supreme Court held that a defendant did have to submit to a pre-trial examination by a Commonwealth psychiatrist, despite his Fifth Amendment right. The only limitation the Court imposed was that the results of that examination would be kept under seal until the defendant presented his evidence of mitigation.

areas and his testimony regarding his findings was appropriate rebuttal to the testimony from the defense expert, James Merikangas, M.D., who attributed the Defendant's targeting of racial minorities to, "command hallucinations." Ultimately, these experts differed on why the Defendant targeted racial minorities. To suggest that it was somehow inappropriate for Dr. Welner to investigate the Defendant's views on racial issues is ridiculous given the nature of these offenses and the testimony from Dr. Merikangas.

The Defendant also claims that Dr. Welner's testimony includes improper comments upon the Defendant's lack of remorse. These comments, contends the Defendant, constituted improper comment upon the Defendant's assertion of his Fifth Amendment right to not testify at trial. While it is improper for the Commonwealth to comment upon a defendant's lack of remorse as such comments can implicate the defendants' constitutional right to not testify in his own defense, where, as here, the reference to a lack of remorse is made by a Commonwealth mental health expert in the context of explaining a diagnosis, the comment is not improper. Here, Dr. Welner offered the opinion that the Defendant suffered from an anti-social personality disorder rather than the more severe form of mental illness described by the defense expert. His comments were offered in rebuttal to that opinion and were, therefore, proper.

In *Commonwealth v. Harris*, 817 A.2d 1033 (Pa. 2002), a defendant raised a similar challenge. In

Harris, the trial court permitted the Commonwealth to cross-examine the defense expert on the defendant's failure to express remorse. On appeal, the defendant argued to the Supreme Court that this line of questioning resulted in an unfair comment upon his decision to not testify. The Supreme Court rejected this claim because the examination of the defense expert on the issue of remorse dealt with the defendant's lack of remorse in the context of his diagnosis of the defendant's mental illness. Similarly, the testimony of Dr. Welner concerning the Defendant's lack of remorse was offered in rebuttal to the testimony of Dr. Merikangas. Dr. Welner testified about the Defendant's lack of remorse in the context of his disagreement with Dr. Merikangas' opinion. Dr. Welner considered that the defendant suffered from anti-social personality disorder. A lack of remorse was discussed because, according to Dr. Welner, it is a characteristic of someone with that disorder. As such, it was proper. Defendant also claims that the Court erred in refusing to permit his father to testify concerning the Defendant's lack of remorse. Mr. Baumhammer's testimony would have been hearsay and it was properly excluded for that reason.

The Defendant also claims that the testimony of Dr. Welner concerning the facts that caused him to entertain the diagnosis of anti-social personality disorder was inadmissible because Dr. Welner did not, ultimately, offer an opinion, within a reasonable degree of medical certainty, that the Defendant suffered from this disorder. Defendant complains that

the facts that Dr. Welner testified to in support of this diagnosis were so inflammatory and unreliable as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Each of these claims is without merit.

The Defendant placed his mental health at issue with his defense of insanity. He presented expert testimony in support of this defense. The testimony of Dr. Welner was offered in rebuttal to opinion offered in support of that defense by his expert. It was certainly proper for Dr. Welner to testify to personality characteristics that are inconsistent with the diagnosis offered by the defense expert, whether or not those characteristics support some other diagnosis to any degree of certainty. The complaint seems to be that Dr. Welner talked about certain negative personality traits and behaviors that he either observed in his examination or became aware of but then did not tie those into his ultimate diagnosis. Any testimony from Dr. Welner that undermined the opinion of Dr. Merikangas was relevant, admissible and proper rebuttal, regardless of whether Dr. Welner tied those observations into his ultimate opinion as to the state of the Defendant's mental health. Dr. Welner was not presented to establish, to a reasonable degree of medical certainty, that the Defendant suffered from any particular mental illness. The issue before the jury was whether the Defendant was legally insane. Dr. Welner's opinion was that he was not legally insane and the facts that he considered in reaching that

conclusion were properly admitted as rebuttal to the testimony of the Defendant's expert.

In his final claim related to the testimony of Dr. Welner, the Defendant claims that Dr. Welner offered his opinion that the Defendant lied and malingered and that his parents lied and failed to show sympathy for the victims. The record of these proceedings, however, demonstrates that this claim is without merit. Dr. Welner did not comment upon the Defendant's credibility as a witness. The Defendant did not testify and was not, therefore, a witness. Dr. Welner did, however, comment upon the Defendant's dishonesty and malingering in the context of his rebuttal to the opinion of Dr. Merikangas. Such testimony was proper and did not constitute an improper comment upon the credibility of the Defendant.

The record also does not support the claim that Dr. Welner made improper comments upon the credibility of the Defendant's parents. The Defendant points to two instances where, he claims, Dr. Welner commented upon the credibility or character of the Defendant's parents. The first set of comments is found at page 1892 of the trial transcript where Dr. Welner stated that the March 2, 2001, recording demonstrated a lack of compassion and an effort to conceal evidence. These comments, however, were made to the Court outside the presence of the Jury. Accordingly, they could not have affected the jury, as the Defendant contends. The second example cited by the Defendant, found at page 2056 of the transcript,

is not as Defendant represents it to be. The Defendant alleges in his Motion that Dr. Welner testified that the Defendant's, "parents believed that Mr. Baumhammers was a racist." (Supplemental Post-Sentence Motion, p. 46). The record reveals, however, that Dr. Welner was not offering his opinion that either Mr. or Mrs. Baumhammers considered their son a racist. He was simply testifying that Mr. Baumhammers had called his son a racist during one of the recorded conversations. He was not offering any opinion on the Defendant's parents, he was simply testifying to the what the Defendant's father said during that recorded conversation. The Court does not consider this to have been an inappropriate comment upon the credibility of the Defendant's parents or an attempt to suggest that the Defendant's parents considered their son to be a racist.

Defendant claims that the Court's instructions to the jury concerning the insanity defense deprived him of due process of law, According to the Defendant, the Court's instruction incorrectly advised the jury that they could not find the Defendant not guilty by reason of insanity even if they were convinced by Dr. Merikangas' testimony that the Defendant was deluded into believing that if he did not carry out the murders, the FBI would kill him or his family, The Court's instructions were correct. The jury was instructed:

> The term insanity has a very special meaning in the criminal law. There was evidence presented from which you may choose, if you

do, to find that the acts involved in this case were not the product of a sound mind. But, understand that mental disease or defect alone does not and cannot absolve a defendant from criminal responsibility.

We call in the law the M'Naghten test, which comes from an 1843 English case against Daniel M'Naghten, basically the common law adaptation of this legal principle. It is not a medical or theological test. Accordingly, the terms of the test are legal and the definition of those terms is matter of law upon which you must follow my instructions. Our courts have declared on many occasions that neither social maladjustments nor lack of self-control nor impulsiveness nor psychoneurosis nor emotional instability nor all of such conditions combined constitute insanity within the criminal concept of that term. Abnormal conditions which medical science might regard as mental illness do not necessarily amount to what the law regards as insanity. Under the test for insanity, a defendant either understands the nature and quality of his acts or he does not. He is either able to distinguish between right and wrong or his is not.

To be legally insane, the defendant must be completely and totally unable to understand the nature and quality of his act or completely and totally unable to distinguish between right and wrong. Pennsylvania rejects any defense that the defendant felt compelled or couldn't stop himself from committing the act

> or acts as a result of an irresistible impulse to kill. Any such defense cannot be accepted and cannot be the basis for any finding of insanity

(N.T. 2688-2690).

The Court then stated:

> You can find the defendant not guilty by reason of legal insanity only if you are satisfied beyond a reasonable doubt that he committed the otherwise criminal acts charged and you are also satisfied by a preponderance of the evidence, first, that he had a mental disease or defect at the time of the acts and, second, that as the result of that disease or defect – here the insanity defense branches into two alternatives – either the defendant was incapable of knowing what he was doing or he was incapable of judging that what he was doing was wrong.

(N.T. 2692-2693).

These instructions properly put before the jury the legal principles that were to guide them in assessing the evidence of the Defendant's mental infirmity. In *Commonwealth V. Banks*, 521 A.2d 1 (Pa. 1987), the Supreme Court held that the trial court instructions on insanity, which are nearly identical to the passages reproduced above, were appropriate. The instructions given by the trial court in *Banks* and by this Court in the instant matter, properly precluded the jury from considering tests for insanity, such as the irresistible impulse test, that have been rejected

by our Supreme Court. In this matter, the Defendant actually received more than he was permitted in that the Court did not strike from the record the testimony of his expert, Dr. Merikangas, which failed to set forth a proper insanity defense. The Court allowed the jury to consider Dr. Merikangas' testimony, but only in the context of the M'Naghten test. It was not error for the Court to instruct the jury on the currently applicable principles of Pennsylvania law, even if those instructions severely limited the application of the opinions offered by the Defendant. Because the claim that the instructions were improper is without merit, the Defendant's ineffectiveness claim with regard to this issue is likewise meritless.

Next, the Defendant contends that the Court erred in failing to instruct the jury that in Pennsylvania a sentence of life imprisonment means that the defendant will not be eligible for parole during his sentence. A "life means life" instruction is only required where the prosecution has raised the defendant's future dangerousness as a factor to be considered by the jury in determining an appropriate sentence. *Commonwealth v. Chandler*, 721 A.2d 1040 (Pa. 1998). Future dangerousness can either be raised explicitly by the prosecutor in their closing argument or, implicitly, through the presentation of evidence tending to establish that the defendant would still pose a danger even if incarcerated. *Kelly v. South Carolina*, 534 U.S. 246 (2000). Clearly, the record establishes that the Commonwealth did not make any argument that the Defendant's possible

future dangerousness should be considered by the jury in fixing sentence. The Defendant does not suggest in his motion that the Commonwealth made any overt statements regarding the danger the Defendant could pose to someone in the future. Nor did the Commonwealth introduce evidence tending to establish that the Defendant posed a danger in the future. The Defendant's reliance on *Kelly*, Supra., is misplaced because that case involved evidence of specific criminal acts committed by the defendant after he was incarcerated, including his possession of a weapon (a shank), an attempted escape from prison and making a plan to force a female guard into his cell where he would hold her hostage. There was no evidence remotely similar to this introduced in this matter. The Defendant simply argues that the severity of the his offenses and of his mental illness would naturally raise in the minds of the jurors a concern that he would be dangerous in the future. That is not enough, however, under the current state of law, to require that the jury be instructed that life imprisonment precludes the possibility of parole. Because such an instruction was not warranted under the facts of this case, the Court did not err in denying the Defendant's request for this instruction nor was counsel ineffective in failing to convince this Court otherwise.

In a similar claim, the Defendant contends that the failure of the Court to instruct the jury as to the meaning of a life sentence violated his right under the Eighth Amendment to have a jury make a

reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. This claim arises out from the concurring opinion authored by Justice Souter in *Simmons*, in which he stated that a jury should be advised as to the meaning of "life imprisonment" whenever there is any reasonable likelihood that the members of the jury may not understand the meaning of the term. It is also a view shared by several members of the Pennsylvania Supreme Court. It is not, however, the view of the majority of either court and, accordingly, affords the Defendant no relief.

Next, Defendant contends that his right to due process was violated because the Commonwealth failed to include in the criminal informations charging him with the murders the specific aggravating circumstances that the Commonwealth would have to prove at the sentencing hearing. He claims that due process requires that the factual elements that the Commonwealth will have to prove to secure the imposition of the death penalty have to be set forth in the charging document, here, the criminal information. The Defendant's reliance on the decisions by the United States Supreme Court in *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), is completely misplaced.

First, the requirement that a defendant be notified of the factual matters that will have to be proven with regard to the offense charged or the possible sentence imposed is met because the Commonwealth

filed, as required by Pa. R. Crim. P. 801, a Notice of Aggravating Circumstances, and served the same on the Defendant. Second, the requirement that a jury make any factual determinations involved in the imposition of a sentence of death was met because the jury here decided, factually, whether the aggravating circumstances were proven beyond a reasonable doubt; whether any mitigating circumstances were proven by a preponderance of the evidence and whether the aggravating circumstances found outweighed any mitigating circumstances found, beyond a reasonable doubt. The Pennsylvania Supreme Court held in *Commonwealth v. Roney*, 866 A.2d 351 (Pa. 2005), that the Pennsylvania capital sentencing scheme is not violative of the principles announced in *Apprendi* and *Ring*, infra.

The Defendant's next claim is that the execution of a mentally ill person violates the prohibition on cruel and unusual punishment found in the Eighth Amendment. He relies on the holding in *Atkins v. Virginia*, 536 U.S. 304 (2002) which bars the imposition of the death penalty upon mentally retarded persons. As the Commonwealth points out in its response, the current state of the law in this nation and, more particularly, in the Commonwealth of Pennsylvania, does not prohibit the execution of persons with mental illness, in contrast to those with mental retardation. *Commonwealth v. Faulkner*, 595 A.2d 28 (Pa. 1991); *cert. denied*. 503 U.S. 989 (1992). Accordingly, this claim must fail.

Finally, the Defendant contends that the Commonwealth violated the Vienna Convention on Consular Relations because it failed to notify the Latvian Consulate of his arrest and also failed to advise the Defendant of his rights pursuant to Article 36 of the Vienna Convention. The Defendant, a natural born citizen of the United States, is also a citizen of the nation of Latvia, his parents' birthplace. Although this Court has serious doubts about the applicability of the protections of the Vienna Convention to natural born United States citizens who possess dual citizenship, it is clear that even if it were applicable to the Defendant, he would be entitled to no relief on this claim. The U.S. Supreme Court and other federal courts faced with Article 36 claims have uniformly expressed the need for a showing of prejudice in order to obtain relief. In the context of federal habeas jurisdiction, the U.S. Supreme Court observed, in *dicta*, "[I]t is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Beard v. Greene*, 523 U.S. 371 (1998). *See United States v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999), (alien must show denial of rights under Vienna Convention resulted in prejudice). The Defendant, a United States citizen and an attorney educated in this country, suffered no prejudice as a result of his not having contact with the

consular officers of the nation of Latvia. This final claim is without merit.

BY THE COURT:

/s/ [Illegible], J.
12/29/05

APPENDIX C

J-25-2008
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 513 CAP
v.	:	Application for Reargument of Appellant, Richard Baumhammers
RICHARD BAUMHAMMERS, Appellant	:	

ORDER

PER CURIAM

AND NOW, this 24th day of February, 2009, the Application for Reargument of Appellant, Richard Baumhammers is hereby **DENIED**.[1]

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[1] In Part XIII of the opinion dated November 20, 2008, this Court held that Appellant had waived the argument discussed therein for failure to raise a relevant objection at trial. It appears on further review that Appellant waived the issue discussed in Part XIII of the opinion at the appellate level. His appellate argument consists of one complete page of written material, with summary citation to two cases. No developed argument is made, nor is one made in Appellant's reply brief with respect to the applicability of the purported law. Arguments not fully developed in an appellate brief are waived. *See* Pa.R.A.P. 2119(a). In his reargument application Appellant sets forth a more fully developed argument; however, a reargument application is not the appropriate vehicle to set forth an argument that should have been made or developed in a principal brief. *See* Pa.R.A.P. 2543 ("Reargument ... will be allowed only when there are compelling reasons therefore.").

(2)

Supreme Court, U.S.
FILED
JUL 31 2009
OFFICE OF THE CLERK

No. 08-1455

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD S. BAUMHAMMERS,
Petitioner,
V.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the petitioner's due process and Eighth Amendment rights were violated by the lack of an instruction, pursuant to *Simmons v. South Carolina*, informing the jury that he would not be eligible for parole if he were sentenced to a term of life imprisonment, given that a) the petitioner never requested such an instruction, and b) the petitioner's future dangerousness was not placed at issue during the entirety of the proceeding?

II. Whether the petitioner's due process rights were violated by the victim impact statements presented during the penalty phase of his trial, even though a) none of the statements were ever objected to by the

petitioner and b) the statements were merely personal accounts by witnesses describing the impact that the murders had on the surviving family members?

III. Whether the Eighth Amendment is violated by the imposition of the death penalty on individuals such as the petitioner, who has been diagnosed with delusional disorders?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

A. PROCEDURAL HISTORY 2

B. FACTUAL HISTORY 8

REASONS FOR DENYING THE WRIT 9

I. DESPITE THE PETITIONER'S ASSERTION TO THE CONTRARY, THERE WERE NO REFERENCES MADE AT TRIAL THAT PLACED HIS FUTURE DANGEROUSNESS AT ISSUE SUCH THAT HE WAS ENTITLED TO AN INSTRUCTION PURSUANT TO *SIMMONS V. SOUTH CAROLINA* INFORMING THE JURY THAT HE WOULD NOT BE ELIGIBLE FOR PAROLE IF GIVEN A LIFE SENTENCE. MOREOVER, THE PETITIONER NEVER EVEN REQUESTED THAT A *SIMMONS* INSTRUCTION BE GIVEN, AND THE SUPREME

COURT OF PENNSYLVANIA CONCLUDED THAT THE PETITIONER WAS NOT ENTITLED TO RELIEF ON THE BASIS OF THIS FAILURE ALONE. THUS, BECAUSE NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE SUPREME COURT, THE PETITIONER HAS NO BASIS FOR A PETITION FOR WRIT OF CERTIORARI..... 9

II. THE PETITIONER NEVER MADE A SPECIFIC OBJECTION TO ANY OF THE VICTIM IMPACT STATEMENTS PRESENTED DURING THE PENALTY PHASE OF HIS TRIAL, AND, AS A RESULT, THE SUPREME COURT OF PENNSYLVANIA RULED THAT THE PETITIONER'S CLAIM THAT THE STATEMENTS WERE UNDULY PREJUDICIAL WAS WAIVED. THUS, BECAUSE NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE SUPREME COURT, THE PETITIONER HAS NO BASIS FOR A PETITION FOR WRIT OF CERTIORARI. IT SHOULD ALSO BE ADDED THAT THE VICTIM IMPACT

STATEMENTS ADMITTED IN THIS CASE DID NOT RUN AFOUL OF THIS COURT'S DECISION IN *PAYNE V. TENNESSEE*. 29

III. THE LAW DOES NOT PRECLUDE THE IMPOSITION OF THE DEATH PENALTY ON INDIVIDUALS SUCH AS THE PETITIONER, WHO HAS BEEN DIAGNOSED WITH DELUSIONAL DISORDERS. 40

CONCLUSION 46

TABLE OF CITATIONS

Cases

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 40, 42, 44

Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. 2008) 8, 14, 19, 23, 34, 38, 45

Commonwealth v. Carson, 913 A.2d 220 (Pa. 2006) 14

Commonwealth v. Dougherty, 860 A.2d 31 (Pa. 2004), *cert. denied*, 546 U.S. 835, 126 S.Ct. 63, 163 L.Ed.2d 89 (2005) 14

Commonwealth v. Eichinger, 915 A.2d 1122 (Pa. 2007), *cert. denied*, __ U.S. __, 128 S.Ct. 211, 169 L.Ed.2d 158 (2007) 35, 36, 38

Commonwealth v. Fahy, 516 A.2d 689 (Pa. 1986) 41

Commonwealth v. Faulkner, 595 A.2d 28 (Pa. 1991), *cert. denied*, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992) 41

Commonwealth v. Means, 773 A.2d 143 (Pa. 2001) 35

Commonwealth v. Moore, 937 A.2d 1062 (Pa. 2007), *cert. denied*, __ U.S. __, 129 S.Ct. 452, 172 L.Ed.2d 326 (2008) 15

Commonwealth v. Trivigno, 750 A.2d 243 (Pa. 2000) 24

Commonwealth v. Williams, 854 A.2d 440 (Pa. 2004), *cert. denied*, 546 U.S. 829, 126 S.Ct. 45, 163 L.Ed.2d 78 (2005) 36

Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002) 11, 15, 16, 17, 18, 21, 22, 25, 26

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) 30, 31, 34, 35, 39

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 26, 27, 28

Rules and Statutes

28 U.S.C.A. §1257(a) 2

42 Pa. C.S. § 9711(e)(3) 41

42 Pa. C.S. §9711(a)(2) 31, 35

U.S.Sup.Ct. Rule 10, 28 U.S.C.A. 10, 11

Rules

Pa.R.A.P. 302(a) 34

OPINIONS BELOW

The Orders and Opinions of the Court of Common Pleas of Allegheny County, Pennsylvania; and the Supreme Court of Pennsylvania have been included as Appendices to the Petition for Writ of Certiorari filed by the petitioner, Richard S. Baumhammers.

JURISDICTION

The petitioner has invoked jurisdiction under 28 U.S.C.A. §1257(a).

STATEMENT OF THE CASE

A. Procedural History

The Commonwealth of Pennsylvania filed a Criminal Information against the petitioner, Richard S. Baumhammers, at No. CC 200014714, charging him with four (4) counts of criminal homicide, in violation of 18 Pa. C.S. §2501, for the April 28, 2000 shooting deaths of Anita Gordon, Anil Thakur, Thoa Quoc Phem and Ji-Ye Sun (Docket Entry No. 31).[1] At Criminal Information No. CC 200014713, the

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[1] The docket entries refer to the docket of the Allegheny County Court of Common Pleas.

petitioner was charged with one (1) additional count of criminal homicide for the April 28, 2000 shooting death of Garry Lee, as well as one (1) count of simple assault, in violation of 18 Pa. C.S. §2701, for pointing his gun at George Thomas II (Part III, Docket Entry No. 3). At Criminal Information No. CC 200014712, the petitioner was charged with one (1) count of aggravated assault, in violation of 18 Pa. C.S. §2702 (a)(1); and one count of attempted homicide, in violation of 18 Pa. C.S. §901, for shooting Sandip Patel (Part II, Docket Entry No. 3). In addition, at that same Criminal Information, the petitioner was charged with eight (8) counts of ethnic intimidation, in violation of 18 Pa. C.S. §2710; two (2) counts of institutional vandalism, in violation of 18 Pa. C.S. §3307; two (2) counts of criminal mischief, in violation of 18 Pa. C.S. §3304; three (3) counts of

arson, in violation of 18 Pa. C.S. §3301; one (1) count of carrying a firearm without a license, in violation of the Uniform Firearms Act, 18 Pa. C.S. §6106; and one (1) count of recklessly endangering another person, in violation of 18 Pa. C.S. §2705 (Part II, Docket Entry No. 3).

At the time of the filing of the Criminal Informations, the Commonwealth also provided notice of its intention to seek the death penalty and notice of the aggravating circumstances (*see* Docket Entry No. 31 *and* Part III, Docket Entry No. 2).

On April 27, 2001, the petitioner proceeded to a trial by jury before the Honorable Jeffrey A. Manning of the Court of Common Pleas of Allegheny County (*see* Docket Entries Nos. 102-05). At the conclusion of trial, on May 9, 2001, the petitioner was found guilty of five counts of murder in the first

degree for the deaths of Anita Gordon, Anil Thakur, Thoa Quoc Phem, Ji-Ye Sun and Garry Lee (TT, 2709; *see also* Docket Entry No. 82 *and* Part II, Docket Entry No. 3).[2] The jury also found the petitioner guilty of all other counts (TT, 2709-11; *see also* Part II, Docket Entry No. 4 *and* Part III, Docket Entry No. 3).

The following day, May 10, 2001, the petitioner proceeded to the penalty phase (*see* Docket Entry No. 106). On May 11, 2001, at the conclusion of that phase of the proceedings, the jury sentenced the petitioner to death at each of the five counts of first-degree murder (TT, 3127). Sentencing on the

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[2] Numbers in parentheses preceded by the letters "TT" refer to the pages of the petitioner's jury trial transcript, dated April 27-May 9, 2001 (*see* Docket Entries Nos. 102-06).

non-capital offenses, as well as the formal imposition of the death sentences, was deferred pending the preparation of a pre-sentence report (TT, 3132).

On September 6, 2001, Judge Manning formally imposed the five sentences of death (*see* Docket Entry No. 87 *and* Part III, Docket Entry No. 4). In addition, the court imposed a total term of imprisonment of one-hundred-and-twelve-and-a-half (112½) to two-hundred-and-twenty-five (225) years at the non-homicide counts, including a twenty (20) to forty (40) year sentence for the attempted murder of Sandip Patel, who, incidentally, was paralyzed from the neck down as a result of this incident and ultimately died on February 3, 2007 at age 32 of complications from pneumonia (*see* Docket Entry No. 96).

Post-sentence motions were denied in this

matter on December 29, 2005 (Docket Entry No. 96). On February 28, 2006, following the trial court's granting of the petitioner's Motion for Leave to File Notice of Appeal Nunc Pro Tunc, the petitioner filed a Notice of Appeal to the Supreme Court of Pennsylvania (Docket Entry No. 100). The petitioner's appeal, docketed at No. 513 Capital Appeal Docket, raised sixteen issues. Following the submission of the Commonwealth's brief on September 14, 2007 and oral argument on March 5, 2008, the Supreme Court – on November 20, 2008 – affirmed the convictions and judgments of sentence of death, as well as the other judgments of sentence. (*See* Appendix A of Petition for a Writ of Certiorari). On February 24, 2009, the Supreme Court denied the petitioner's Application for Reargument. (*See* Appendix C of Petition for a Writ of Certiorari).

B. Factual History

The factual history underlying the petitioner's convictions has been set forth in great detail by the Supreme Court of Pennsylvania in *Commonwealth v. Baumhammers*, 960 A.2d 59, 69-71 (Pa. 2008) (*see also* pages 6-12 of Appendix A of Petition for Writ of Certiorari).

REASONS FOR DENYING THE WRIT

I. DESPITE THE PETITIONER'S ASSERTION TO THE CONTRARY, THERE WERE NO REFERENCES MADE AT TRIAL THAT PLACED HIS FUTURE DANGEROUSNESS AT ISSUE SUCH THAT HE WAS ENTITLED TO AN INSTRUCTION PURSUANT TO *SIMMONS V. SOUTH CAROLINA* INFORMING THE JURY THAT HE WOULD NOT BE ELIGIBLE FOR PAROLE IF GIVEN A LIFE SENTENCE. MOREOVER, THE PETITIONER NEVER EVEN REQUESTED THAT A *SIMMONS* INSTRUCTION BE GIVEN, AND THE SUPREME COURT OF PENNSYLVANIA CONCLUDED THAT THE PETITIONER WAS NOT ENTITLED TO RELIEF ON THE BASIS OF THIS FAILURE ALONE. THUS, BECAUSE NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE SUPREME COURT, THE PETITIONER HAS NO BASIS FOR A PETITION FOR WRIT OF CERTIORARI.

Richard S. Baumhammers, in his Petition for a Writ of Certiorari, contends that his due process rights were violated by the trial court's failure to

instruct the jury during the sentencing phase of his capital proceeding that a defendant convicted of first-degree murder in Pennsylvania cannot be released on parole. It is clear that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." U.S.Sup.Ct. Rule 10, 28 U.S.C.A. The Commonwealth of Pennsylvania respectfully submits that there are no compelling reasons here.

In determining whether a petition for a writ of certiorari will be granted, this Honorable Court considers situations in which "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals," or in which "a state court...has decided an

important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S.Sup.Ct. Rule 10(b) and (c), 28 U.S.C.A. The petitioner claims here that the Supreme Court of Pennsylvania has failed to follow the directives of this Honorable Court's decisions in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), in that, despite the fact that evidence of the petitioner's future dangerousness was presented during his trial, the jury was still not given an instruction regarding parole ineligibility. The Commonwealth – and the Supreme Court of Pennsylvania – do not agree that the petitioner's future dangerousness was raised at trial, but, before

addressing the merits of the petitioner's claim, it should first be pointed out that he never specifically requested that such an instruction be given to the jury.

In *Simmons*, a plurality decision, the issue was whether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial court to instruct the jury in the penalty phase of a capital case that, under state law, the defendant was ineligible for parole. 512 U.S. at 156. There, the defendant, believing that there was a reasonable likelihood that the jurors would vote for death simply because of their mistaken belief that he would eventually be released on parole, asked the trial judge to give an instruction clarifying the precise definition of "life imprisonment." *Id.* at 158-59. The prosecution opposed the proposed

instruction, urging the court not to charge the jury at all regarding parole; the trial court sided with the prosecution and refused the defendant's requested instruction. *Id.* at 159-60. This Honorable Court ultimately concluded that the refusal to give the instruction was error, holding that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole eligible." *Id.* at 156.

In the wake of that decision, the Pennsylvania Supreme Court has made clear that the so-called *Simmons* instruction is mandated only if two events occur: (1) the prosecution must place the defendant's future dangerousness at issue; and (2) the defendant must have requested that the trial court issue the

instruction. *Commonwealth v. Carson*, 913 A.2d 220, 273 (Pa. 2006); *Commonwealth v. Dougherty*, 860 A.2d 31, 37 (Pa. 2004), *cert. denied*, 546 U.S. 835, 126 S.Ct. 63, 163 L.Ed.2d 89 (2005). In the instant case, the petitioner never asked the trial court to provide an instruction in accordance with *Simmons*; thus, the petitioner's claim was clearly waived. *See Dougherty*, 860 A.2d at 37-38. The Supreme Court here agreed, ruling that because the petitioner did not request a *Simmons* charge, he was not entitled to any relief on his due process claim for that reason alone. *See Commonwealth v. Baumhammers*, 960 A.2d 59, 92 (Pa. 2008). Because the instant issue was not preserved for appeal by the petitioner, the Supreme Court's proper dismissal of the claim on the basis of waiver does not involve an important federal question, nor does it conflict with any relevant

decisions of this Honorable Court. Accordingly, the petitioner's writ should not be granted. *See Kelly*, *supra*, 534 U.S. at 249-50 (defense counsel, relying on *Simmons*, twice requested that the trial court instruct the jurors that if the defendant received a sentence of life imprisonment, he would not be eligible for parole). *See also Commonwealth v. Moore*, 937 A.2d 1062, 1074 (Pa. 2007), *cert. denied*, ___ U.S. ___, 129 S.Ct. 452, 172 L.Ed.2d 326 (2008) (defendant's challenge that *Simmons* instruction should have been given is waived because defendant did not request such an instruction at trial).

The Commonwealth would add that, despite the petitioner's contention to the contrary, his future dangerousness was not raised during trial. In *Simmons*, the prosecution, in its closing argument, expressly stated that the future dangerousness of

the defendant, who had beaten an elderly woman to death in her home, was a factor for the jury to consider when fixing the appropriate punishment. 512 U.S. at 156-57. Specifically, the prosecution maintained that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* at 157. As noted above, because the defendant's future dangerousness was put at issue by the prosecution, this Court ruled that the defendant was entitled to inform the jury of his parole ineligibility. *Id.* at 171.

Similarly, in *Kelly*, the prosecution presented evidence at the capital sentencing proceeding that while in prison following the murder for which he was convicted, the defendant made a shank and had taken part in an escape attempt, even to the point of planning to draw a female guard into his cell where

he would hold her hostage. 534 U.S. at 248. During closing argument, the prosecutor told the jurors that the defendant "doesn't have any mental illness. He's intelligent...He's quick witted. Doesn't that make somebody a little more dangerous—." *Id.* at 250. Defense counsel interrupted and made an objection, presumably, according to this Court, based on the prosecution having raised the defendant's future dangerousness. *Id.* The prosecutor later continued: "[M]urderers will be murderers." *Id.* Prior to closing argument, the trial court had refused the defense's request to give the jury a *Simmons* instruction on the grounds that the prosecution's evidence went to the defendant's character, not to his future dangerousness, *id.* at 249, and the court again refused to do so following closing arguments, despite defense counsel's renewed request. *Id.* at 250. This

Court found the trial court to have erred, noting that evidence of violent behavior in prison raises a strong implication of future dangerousness. *Id.* at 253. Furthermore, the *Kelly* Court stated that the prosecutor's closing argument to the jury, as it did in *Simmons*, implied that the defendant would, in fact, be let out of prison eventually if the jury did not return a sentence of death. *Id.* at 255. Thus, the jury, like the one in *Simmons*, had been invited by the prosecutor to infer that the defendant was a violent predator who posed a continuing threat to the community. *Id.* at 256.

By contrast, in the instant case, the prosecution made no such references to a continuing threat posed by the petitioner. During the penalty phase of the proceeding, prior to all testimony, defense counsel sought to present an affidavit from

the Secretary of the Pennsylvania Board of Pardons indicating that in the previous 23 years, only one person sentenced to life imprisonment had his or her sentence commuted or had a pardon granted for a first-degree murder conviction (TT, 2761-65).[3] The prosecutor objected, noting that such evidence was not admissible unless and until the Commonwealth raised the future dangerousness of the defendant, and he informed the court that the defendant's future dangerousness "has not been in evidence nor will it be placed in evidence in this phase of the trial" (TT, 2765). The trial court stated that it believed that the law was clear that this type of evidence was

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[3] As the Supreme Court pointed out, "a request to introduce such evidence is not the equivalent of asking the court to provide a specific instruction to the jury pursuant to *Simmons*." *See Baumhammers*, 960 A.2d at 92.

not admissible until the prosecution raised the issue of future dangerousness, but he took the matter under advisement (TT, 2766). After the conclusion of all other sentencing testimony, defense counsel again asked the court if he could introduce into evidence the letter from the Secretary of the Board of Pardons (TT, 3073). The prosecutor again pointed out that the Commonwealth had not raised the issue of the defendant's future dangerousness (TT, 3073). The trial court stated that he agreed with the prosecutor that "there is no indication or evidence on the record" of such future dangerousness, and, therefore, because the affidavit that the defense sought to admit was not relevant, the Commonwealth's objection to it was sustained (TT, 3075-76).

The petitioner does not attempt to suggest

here that the prosecutor, through his argument to the jury, put at issue the petitioner's future dangerousness in the manner that the prosecutors did in *Simmons* and *Kelly*. Rather, the petitioner contends that his future dangerousness was placed before the jury in other ways; namely, through the Commonwealth's psychiatric expert, Dr. Michael Welner, who "suggested to the jury that Baumhammers would continue to commit crimes in the future," and also through the evidence of the five murders that the petitioner committed as well as through the numerous psychiatrists who testified about the likely reemergence of his psychotic behavior without a daily regimen of medication (*see* Petition for Writ of Certiorari, at pp. 9-10). But as was set forth above, in both *Simmons* and *Kelly* there was express comment by the prosecutor

implying that the defendant was dangerous and would be a threat to the community after eventually being let out of prison unless the jury returned a sentence of death. Furthermore, in ruling that the defendant was allowed the to bring his parole ineligibility to the jury's attention, this Court in *Simmons* gave as its reason the fact that the prosecution was "rest[ing] its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future." 512 U.S. at 168-69. In ruling the same way, the *Kelly* Court said that "the evidence **and argument**" presented by the prosecution were at odds with the view that the defendant's future dangerousness was not an issue in the case. 534 U.S. at 253 (emphasis added). Thus, it seems clear from the language of both of these decisions that in order for a defendant's

future dangerousness to be at issue, the prosecution needs to at least imply to the jurors through argument that they should return a sentence of death because of the defendant's continuing threat to society. Because the prosecutor in the instant case unquestionably did not raise the issue of future dangerousness through argument to the jury – a fact that the petitioner concedes, by the way, *see Baumhammers*, 960 A.2d at 91 – the petitioner cannot contend that the Supreme Court's decision to deny his claim on the grounds that his future dangerousness was not placed at issue is in conflict with the relevant decisions of this Court. For this additional reason, separate and apart from the fact that the issue was not properly preserved in the trial court, the petitioner's writ should not be granted. *See also Commonwealth v. Trivigno*, 750 A.2d 243 (Pa.

2000) (trial court erred in refusing to give *Simmons* instruction where prosecutor, in penalty-phase closing argument, specifically told the jury that the defendant's past crimes pointed toward the future).

Lastly with regard to the petitioner's due process claim, even if – as the petitioner suggests – a defendant's future dangerousness can be placed at issue solely through the evidence admitted at trial, the evidence cited by the petitioner here does not suffice. As set forth in the preceding paragraph, the petitioner contends that the prosecution's expert, Dr. Welner, indicated to the jury that he would commit crimes in the future; as support for this claim, the petitioner cites to one lone page of trial transcript – page 2029. On that page, Dr. Welner merely states that a possible diagnosis of the petitioner was that he suffered from antisocial personality disorder, "a

personality disorder that is characteristic of a pattern of rule breaking...and lying across the life cycle in a variety of different settings." The Commonwealth does not see how Dr. Welner's conclusion that the mental delusions from which the petitioner suffers make him likely to lie and break rules is evidence of future dangerousness or the propensity for violence. Similarly, evidence from the "myriad psychiatrists" – the petitioner fails to mention that all of these witnesses, except for Dr. Welner, were called by the defense – who testified about the petitioner's chronic mental illness, as well as his feelings of racial hatred, is certainly not the equivalent of the evidence presented in a case such as *Kelly*, where it was established that the defendant, while awaiting trial, made a shank in prison that he planned to use to take a female guard

hostage. As the Honorable Jeffrey A. Manning stated in his opinion following the denial of the petitioner's post-sentence motions, the petitioner's "reliance on *Kelly*...is misplaced because that case involved evidence of specific criminal acts committed by the defendant after he was incarcerated...There was no evidence remotely similar to this introduced in this matter. The [petitioner] simply argues that the severity of...his offenses and of his mental illness would naturally raise in the minds of the jurors a concern that he would be dangerous in the future. That is not enough, however, under the current state of [the] law, to require that the jury be instructed that life imprisonment precludes the possibility of parole" (*see* Appendix B of Petition for Writ of Certiorari, at p. 131). The Commonwealth agrees with this assessment. Neither *Kelly* nor *Simmons*

offers the petitioner any grounds for relief. Accordingly, his Petition for Writ of Certiorari should be denied.

In addition to his due process claim, the petitioner contends that the failure to give a *Simmons* instruction also violates the Eighth Amendment's "need for heightened reliability in capital cases" (*see* Petition for Writ of Certiorari, at p. 17). As support for his position, the petitioner quotes Justice Souter's concurring opinion in *Simmons*, in which he stated that whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, "a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated..." 512 U.S. at 172-73 (*see* Petition for Writ of Certiorari, at p. 18). As established

earlier in this argument, the petitioner did not demand an instruction on the meaning of life imprisonment, nor did the trial court refuse such a request. Thus, on that basis alone, the petitioner's claim fails. Moreover, the petitioner's contention that even if his future dangerousness was never placed at issue, a *Simmons* instruction was nevertheless required under the Eighth Amendment is not supported by the binding precedent of this Court (or, for that matter, any other Court). Accordingly, the writ should not be granted on this basis either.

II. THE PETITIONER NEVER MADE A SPECIFIC OBJECTION TO ANY OF THE VICTIM IMPACT STATEMENTS PRESENTED DURING THE PENALTY PHASE OF HIS TRIAL, AND, AS A RESULT, THE SUPREME COURT OF PENNSYLVANIA RULED THAT THE PETITIONER'S CLAIM THAT THE STATEMENTS WERE UNDULY PREJUDICIAL WAS WAIVED. THUS, BECAUSE NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE SUPREME COURT, THE PETITIONER HAS NO BASIS FOR A PETITION FOR WRIT OF CERTIORARI. IT SHOULD ALSO BE ADDED THAT THE VICTIM IMPACT STATEMENTS ADMITTED IN THIS CASE DID NOT RUN AFOUL OF THIS COURT'S DECISION IN *PAYNE V. TENNESSEE*.

The petitioner's next claim is that the victim impact statements presented during the penalty phase violated his due process rights in that the testimony was unduly prejudicial. While acknowledging that of the 37 states with the death penalty, all have statutes permitting some form of

victim impact evidence at capital sentencing proceedings, and while also conceding that victim impact evidence is at least permissible under this Honorable Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the petitioner claims that the evidence presented in his case "far exceeded" that which is proper (*see* Petition for Writ of Certiorari, at pp. 22-23). The Commonwealth wholeheartedly disagrees but, as was the case with the preceding issue, must first submit that the claim was never preserved for appeal.

During the penalty phase, defense counsel presented a motion in limine in which he asked the trial court to disallow any victim impact statements at all on the grounds that such statements were unconstitutional because they did not apply to any of

the statutory aggravating factors (*see* TT, 2735-37). The trial court, noting that this Court had approved the admission of victim impact statements in *Payne*, allowed the Commonwealth to present victim impact testimony (*see* TT, 2758).[4] Defense counsel then told the court that he wanted copies of statements from all of the potential Commonwealth witnesses in case he wanted to voice an objection prior to their taking the stand (TT, 2767). The trial court informed defense counsel that he could ask the prosecutor for an offer of proof prior to each witness being called and the defense could raise an objection at sidebar at that time if it so chose; defense counsel thereupon

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[4] The introduction of victim impact testimony in the penalty phase of a capital case is also authorized by statute in Pennsylvania. *See* 42 Pa. C.S. §9711(a)(2).

acknowledged that he understood that any objections were to be raised on a witness-by-witness basis (TT, 2768). The prosecutor assured defense counsel that he was only going to ask the witnesses to identify their relationship to the victim, provide a brief idea of who the victim was, and describe what impact the victim's death had on them or the victim's family; he stated that he would not be asking their personal opinions of the defendant or their beliefs on what the appropriate penalty should be (TT, 2769).

At the penalty phase, the Commonwealth proceeded to present the victim impact testimony of twelve witnesses, which included the wife of murder victim Thoa Quoc ("Tony") Phem; the father and wife of murder victim Ji-Ye ("Jerry") Sun; two daughters and a cousin of murder victim Anita Gordon; the mother, girlfriend, aunt and cousin of murder victim

Garry Lee; and two countrymen of murder victim Anil Thakur, who were familiar with the family whom Thakur had left behind in India (*see* TT, 2820-36). The petitioner contends that certain portions of this testimony were "extensive and emotionally overwhelming" and that the testimony "injected emotional considerations that had no relevant purpose in the proceedings" (*see* Petition for Writ of Certiorari, at pp. 23-25). It is clear from the testimony of each of these witnesses, however, that the defense made no objection to any of their statements.[5] *See Baumhammers*, *supra*, 960 A.2d at

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[5] The only objection raised by the defense at this time was to a photograph that the Commonwealth attempted to introduce during the testimony of Jerry Sun's father; the trial court sustained the objection and did not allow the jury to see the photograph (TT. 2876-77).

93. Thus, because the petitioner made no specific, timely objection in the trial court to the statements that he wished to challenge on appeal, the Supreme Court found the issue to be waived, citing Pennsylvania Rule of Appellate Procedure 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). *Baumhammers*, at 93. Given that the issue was not properly preserved for appeal, the Supreme Court's dismissal of the claim on this basis does not involve an important federal question, and, accordingly, the petitioner's writ should not be granted.

In any event, even if waiver were put aside, the petitioner's claim would have no merit. In *Payne*, this Court held that "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is

relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. at 827. In Pennsylvania, in addition to the legislature codifying this language at 42 Pa. C.S. §9711(a)(2), the Supreme Court "set out clear guidelines for victim impact statements in death cases[,] [holding] that Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding and that our sentencing scheme does not limit this evidence in the penalty phase to only the information necessary to establish aggravating and mitigating circumstances." *Commonwealth v. Eichinger*, 915 A.2d 1122, 1139 (Pa. 2007), *cert. denied*, __ U.S. __, 128 S.Ct. 211, 169 L.Ed.2d 158 (2007), citing *Commonwealth v. Means*, 773 A.2d 143, 153 (Pa. 2001). The Court continued: "Victim impact testimony is permissible when the

Commonwealth establishes that the victim's death had an impact on the victim's family as opposed to presenting mere generalizations of the effect of the death on the community at large. Once this threshold has been met, the trial court has discretion over the testimony admitted." *Eichinger*, at 1139-40. *See also Commonwealth v. Williams*, 854 A.2d 440, 446 (Pa. 2004), *cert. denied*, 546 U.S. 829, 126 S.Ct. 45, 163 L.Ed.2d 78 (2005).

In the instant matter, the petitioner shot and killed five people in a spree in which he targeted racial and ethnic minorities, and the petitioner cannot argue here – and, in fact, does not argue here – that those deaths did not have a specific impact on each victim's family. Speaking in regard to that impact, Anita Gordon's daughter testified during the penalty phase, that her father is disturbed whenever

he sees his wife's picture and that her grandmother had to be moved to a nursing home because Mrs. Gordon is no longer around to help her (TT, 2867). Anil Thakur's countrymen testified that Thakur's death had a financial effect on his family back in India (TT, 2853-554). Garry Lee's girlfriend talked of how she does not want to leave the house sometimes because of Lee's death and how his death also negatively affected the moods of his mother and sister (TT, 2886). Jerry Sun's wife testified that at the time of her husband's death, she could not eat or sleep (TT, 2884). Sun's father testified that, as a result of crying over Sun's death, his wife had to undergo surgery on her right eye to keep her from losing her sight (TT, 2876). Tony Pham's wife testified that their six-year-old son asks her how his father died and whether he will be coming back (TT,

2838). The Pennsylvania Supreme Court had previously held that testimony such as this – "personal account[s] which demonstrated the devastating impact the murders had" on a victim's surviving family members – was indeed appropriate victim impact evidence in capital sentencing proceedings. *Id.* at 1140. The *Baumhammers* Court ruled that the victim impact testimony challenged by the petitioner here consisted merely of this type of personal account describing the impact the murders had on the surviving family and that the number of witnesses called to testify was not disproportionate to the large number of victims; thus, there was no error in admitting the evidence, even if the petitioner had not waived the issue. 960 A.2d at 94. The Commonwealth would respectfully submit that this ruling was proper, given this Court's conclusion

in *Payne* that "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness," a State may legitimately decide that the jury "should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825. For this additional reason, the petitioner's writ should not be granted.

III. THE LAW DOES NOT PRECLUDE THE IMPOSITION OF THE DEATH PENALTY ON INDIVIDUALS SUCH AS THE PETITIONER, WHO HAS BEEN DIAGNOSED WITH DELUSIONAL DISORDERS.

The petitioner's final claim is that this Honorable Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that the execution of mentally retarded criminals was cruel and unusual punishment prohibited by the Eighth Amendment, should be extended to persons with mental illness. The petitioner states that *Atkins* stands for the proposition that "imposing a death sentence on mentally retarded individuals violates the evolving standards of decency embodied in the Eighth Amendment's Cruel and Unusual Punishment clause," and he maintains that "[t]he Supreme Court of Pennsylvania has ruled to the contrary" (*see*

Petition for Writ of Certiorari, at p. 28). This latter assertion is simply incorrect. In *Commonwealth v. Faulkner*, 595 A.2d 28, 38 (Pa. 1991), *cert. denied*, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992), the Supreme Court ruled that the Eighth Amendment is not violated by the imposition of the death penalty even in situations where the jury found as a mitigating factor that the defendant suffered from "a degree of mental illness." *See also Commonwealth v. Fahy*, 516 A.2d 689, 698-99 (Pa. 1986) (a finding of substantial impairment under 42 Pa. C.S. § 9711(e)(3), which deals with the capacity of a defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, does not bar a penalty of death imposed by a jury). Neither *Faulkner* nor *Fahy* involved a defendant who was mentally retarded, and,

therefore, the petitioner has wholly mischaracterized the prior decisions of the Supreme Court of Pennsylvania when he suggests that that Court has ruled contrary to this Court's decision in *Atkins*.

In any event, the petitioner, citing *Atkins*, sets forth the clinical definition of mental retardation, which he indicates is characterized by "significantly subaverage intellectual functioning"; he adds that the *Atkins* Court further stated that an IQ of 75 is "typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition..." (*see* Petition for Writ of Certiorari, at pp. 28-29). The Commonwealth does not understand why the petitioner dedicates nearly two full pages of his seven-page argument to the definition of mental retardation when it was established at trial that he was, in fact, a law school

graduate (*see* TT, 2903-04). The petitioner clearly does not suffer from mental retardation, a fact that he later goes on to concede in his petition (*see* Petition for Writ of Certiorari, at p. 30).

Moreover, as the primary support for his claim that the death penalty should not be imposed on individuals with mental illness, the petitioner relies on "non-majority opinions" in which judges "have expressed doubt" as to the appropriateness of executing persons who have some form of mental disorder (*see* Petition for Writ of Certiorari, at p. 31). The Commonwealth acknowledges that the psychiatric witnesses in this case, including Commonwealth expert Dr. Welner, testified that the petitioner suffered from delusional disorders (*see* TT,

1935).[6] But the petitioner has cited no law that indicates that an individual with this condition cannot be subjected to the death penalty (nor, for that matter, has the petitioner set forth exactly what this condition entails). *Atkins* offers him no help, as that case dealt with a defendant with an IQ of 59, *see* 536 U.S. at 309, whereas the petitioner, as alluded to above, was a former practicing attorney. The Commonwealth agrees with the Supreme Court of Pennsylvania that the petitioner has failed to advance a compelling argument that the evolving standards of decency preclude an individual such as

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[6] Dr. Welner indicated that, by definition, delusional disorder – while marked by a person's irrational ideas – does not necessarily compromise that person's ability to distinguish right from wrong or his ability to know the nature and quality of his acts (TT. 1936-37).

himself from being subject to the death penalty. *See Baumhammers*, 960 A.2d at 97. Thus, his writ should not be granted.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I am this day serving three (3) copies of the within Respondent's Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court of Pennsylvania in the manner indicated below, which service satisfies the requirements of United States Supreme Court Rule 29:

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In The

Supreme Court of the United States

RICHARD S. BAUMHAMMERS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

REPLY BRIEF FOR PETITIONER RICHARD BAUMHAMMERS 1

CONCLUSION 3

TABLE OF AUTHORITIES

Atkins v. Virginia, 536 U.S. 304 (2002) 1, 3

REPLY BRIEF FOR PETITIONER RICHARD BAUMHAMMERS

Contrary to Respondent's argument, the issue of whether this Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), should be extended to the mentally ill is squarely presented by this case. As our opening brief explained, "individuals who are mentally ill suffer many of the same deficiencies and limitations inherent in those individuals who are mentally retarded, and therefore, should be treated similarly in the eyes of the law and entitled to the same protections under *Atkins v. Virginia*, 536 U.S. 304 (2002), and the Eighth Amendment." *See* Petition for Writ of Certiorari at 30-31.

The Respondent further argues that Mr. Baumhammers failed to define his mental illness or to explain why it should preclude imposition of the death penalty. Commonwealth's Brief in Opposition at 44. This is wrong. The record indisputably showed that Mr. Baumhammers suffers from delusional disorder of the persecutory type. *See* DE 104, TT at 1544 (Dr. Ninan), 1588 (Dr. Friedman), 1431 (Dr. Merikangas), 1630 (Dr. Keshevan), 1936 (Dr. Welner), 1791 (Dr. Martone).

The DSM specifically describes and defines delusional disorder. Delusional disorder was previously known as paranoid disorder. A person suffering from delusional disorder cannot tell what is real from what is imagined. The main feature of the disorder is the presence of delusions, which are unshakeable

beliefs in something that is untrue for at least one (1) month's duration and does not have the characteristic symptoms of other psychotic disorders, such as schizophrenia. DSM-IV-TR at 329 (Diagnostic criteria for 297.1 Delusional Disorder). The delusions may involve situations that could occur in everyday life, such as being followed, poisoned, deceived, or conspired against. *Id.*

Mr. Baumhammers' delusional disorder is of the persecutory type. People suffering from this type of disorder believe that they or someone close to them are being mistreated, or that someone is spying on them or planning to harm them. *Cleveland Clinic*, available at http://my.clevelandclinic.org/disorders/delusional_disorder/hic_delusional_disorder.aspx. It is not uncommon for people with this type of delusional disorder to make repeated complaints to legal authorities. Delusional disorder is highly resistant to treatment with medication alone. *Id.* People with severe symptoms, such as Mr. Baumhammers, are at risk of hurting themselves or others and may require hospitalization and observation until the condition is stabilized. *Id.* Acting on the delusions can lead to violence or legal problems, as it is with Mr. Baumhammers. *Id.*

Respondent repeatedly points out that Mr. Baumhammers is a law school graduate in what can only be interpreted as an attempt to downplay his mental illness. However, people who are diagnosed with delusional disorder often can continue to socialize and function quite normally, apart from the

subject of their delusion, and generally do not behave in an obviously odd or bizarre manner. *Id.* Mr. Baumhammers, regardless of his educational background, clearly suffers from a mental illness. The extensive psychiatric testimony throughout the guilt and penalty phase of the trial cannot be ignored.

Mr. Baumhammers submits that the *Atkins* decision should be extended to individuals, like him, who are mentally ill.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of Pennsylvania should be reversed.

This, the 19th day of August, 2009

Respectfully submitted,

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